TOWARDS A WORLD FAMILY

A REPORT AND RECOMMENDATIONS RESPECTING

HUMAN RIGHTS

IN

NEW BRUNSWICK

Charles Ferris

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INTRODUCTION

In the Spring of 1989, the Province of New Brunswick requested that I undertake an examination of human rights within the Province. The terms of reference of the request were to inquire into, study and report on the following issues:

a) whether the current human rights law conforms with the requirements of the Canadian Charter of Rights and Freedoms;

b) whether the orientation and scope of the current law are appropriate to address problems and expectations in the human rights area;

c) the appropriate composition of the Human Rights Commission, and the terms of office and functions of the body's Chairperson, Commissioners and staff;

d) whether the mandate of the Human Rights Commission is adequate and appropriate;

e) whether the procedures and remedies currently provided for human rights issues are adequate and appropriate;

f) any other issues regarding human rights or related matters you consider significant.

The Province further requested that a report, including recommendations for legislative changes, be submitted by the Fall of 1989.

To assist in this process, a budget of $46,000.00 was made available by the Department of Labour, in addition to equipment and administrative resources from the same authority. The assistance of Ms. Kay Harding and members of her staff is greatly appreciated.

The following persons were engaged to assist in the work:

Legal Consultant

- **Bryant Smith**, B. Comm., LL.B., B.C.L. (Oxon.), Professor of Law at the University of New Brunswick, sometime Lecturer of Law at the Native Law Centre. University of Saskatchewan, and former Law Clerk to the Honourable Mr. Justice G.V. La Forest of the Supreme Court of Canada;

Research Assistants

- **Odette MacLeod**, B.A., LL.B., of the law firm Beament, Green, Ottawa, and former Assistant to the Executive Director of the Canadian Deaf-Blind and Rubella Association;

- **Christian Whalen**, B.A., LL.B., Law Clerk to the Honourable Mr. Justice Teitelbaum of the Federal Court of Canada.

Administrative and Research Officer and Secretary

- **Marie-Claire Landry**, formerly an Administrative Officer with the Canadian Broadcasting Corporation and the Université de Moncton;

- **Jeanne Breau**, Secretary, Office of the Ombudsman.

Prof. Smith, Ms. MacLeod and Mr. Whalen each contributed to the research and writing of this Report.

Ms. Landry and Ms. Breau very competently discharged the administrative and stenographic prerequisites of the work.

The methodology of the work was as follows:

a) approximately 100 groups and individuals were consulted on the question of human rights;

b) legal research was undertaken to determine the impact of the Canadian Charter of Rights and Freedoms on human rights in Canada and the interpretation of Canadian Human Rights Codes;

c) detailed questionnaires were completed by and interviews held with senior staff members of Canada's twelve statutory human rights agencies;

d) the Department of Labour and Multiculturalism was consulted and a submission was received from it entitled "Human Rights Evaluation" (June, 1989);

e) human rights seminars sponsored by the Canadian Bar Association, the Atlantic Human Rights Centre and the Canadian Human Rights Foundation were attended; and

f) a "Summary of Survey Results" with respect to a Survey on Racial Prejudice prepared by Professor Joseph Fletcher of the Department of Political Science and the Centre of Criminology of the University of Toronto, was commissioned.

The extent and quality of cooperation has been at the highest level through all aspects of this work.

I am particularly grateful for the support and encouragement provided to this work by the Ombudsman, Mr. Joseph Bérubé, members of the Office of the Ombudsman, Ms. Magella St-Pierre and Ms. Gisèle Girouard, and students-at-law Ms. Goldie Shea and Mr. Charles French.

Finally, I should like to thank Prof. Beverly Smith, Professor of Law at the University of New Brunswick, for very kindly agreeing to read and comment upon the text of this Report.

Charles Ferris
Fredericton, New Brunswick
November 28, 1989

EXECUTIVE SUMMARY AND RECOMMENDATIONS

The object of this report is to recommend the means by which New Brunswick's legislative and administrative structures may best promote fundamental human rights within its borders - and, where permissible, beyond. This objective has been pursued by the world community, of which New Brunswick is a part, through enactments of the United Nations and its affiliated bodies. Canada and New Brunswick are obliged by law to observe these standards of the international world community. New Brunswickers are citizens of the World and must be assured of the same fundamental rights to which all members of the world community aspire.

Being part of a world family - like being part of one's own family - contemplates a level of acceptance and expectation, tolerance and respect. Tension is invariably part of the relationship; however, it is necessary to ensure that the tensions remain healthy, that they do not destroy the relationship. To help ensure the stability and growth of relationships, certain rules of conduct must be mutually understood and accepted. Within the immediate family, such rules are usually informal, the result of a series of spoken and unspoken dialogue, and underlying moral beliefs.

At the world level, the United Nations has evolved a set of rules to facilitate healthy, growing relationships between and within its member states. These rules are known collectively as the United Nations International Bill of Rights. Under its terms, the member states, including Canada, agree to respect and promote a broad range of legally binding fundamental, democratic, economic, social, cultural and anti-discrimination rights and freedoms for the purpose of promoting equality of opportunity.

As part of the Canadian federal state, New Brunswick is bound by the United Nations instruments. Indeed, New Brunswick has been a leader in the protection and promotion of the fundamental rights and freedoms enunciated thereunder. Moreover, the guiding philosophical principle underlying the provincial administration - equality of opportunity - complements and draws inspiration from the International Bill of Rights. The recommendations of this report are designed to underscore and revitalize the Province's commitment to the protection and promotion of fundamental rights and freedoms.

The primary focus of this inquiry has been on legal structures - the type of legal instrument that would best enable New Brunswick to meet its international legal obligations and, in so doing, to promote a vital community based on respect for freedom and the recognition of responsibility to others.

The report's first recommendation for meeting the broad primary objective is legal in nature, namely, the enactment of a comprehensive human rights statute, the New Brunswick Charter of Rights and Freedoms, which would incorporate fundamental, democratic, legal, economic, cultural, social, environmental and anti-discrimination rights and freedoms.

For the most part, such a step would codify in a single enactment the province's existing legal obligations under the U. N. International Bill of Rights and the Canadian Charter of Rights and Freedoms. However, it would also provide a focus and a discipline that would complement the well-recognized need to promote human rights and responsibilities in New Brunswick in a co-ordinated fashion.

The second recommended initiative, which is legislative in nature, is the revision of the mandate, jurisdiction and powers of the New Brunswick Human Rights Commission to more properly reflect the central position that the protection of human rights has traditionally occupied in this Province. It is concluded that the broader promotional and compliance role foreseen for the Commission necessarily requires its removal from a central authority (presently the Department of Labour) and its reconstitution as a legislative office. Such action would complement the clarification and extension of the anti-discrimination provisions of the New Brunswick Human Rights Code consistent with the Canadian Charter of Rights and Freedoms and the norms established by other Canadian statutory human rights agencies.

The report's third broad recommendation, which is administrative in nature, is that the Executive Council co-ordinate the compliance with and promotion of human rights, freedoms and responsibilities contained within the New Brunswick Charter. It is envisaged that this co-ordinating function would serve to confirm and underscore the existing human rights mandate of the Departments of Justice, Labour and Multiculturalism, Education, Advanced Education and Training, Health and Community Services, Income Assistance, Environment, and Solicitor General. Such coordination would also provide a greater opportunity for consultation by and with other public and private human rights bodies.

This proposed structure presents New Brunswickers with a unique opportunity for leadership that ought not to be squandered by a lack of vision. These recommendations aspire to three important objects. First, they will foster in New Brunswickers a greater sense of commitment to the achievement of equality of opportunity through the promotion of fundamental human rights. Second, they will illuminate the fact that New Brunswick, as a bilingual and multicultural community, is a microcosm of a larger world family. Finally, these recommendations may create legal structures that are attuned to international realities which would facilitate and complement the Province's economic, financial and commercial initiatives.

RECOMMENDATIONS:

2.1 It is recommended that the Government of New Brunswick enact a comprehensive human rights statute, the New Brunswick Charter of Rights and Freedoms ("the New Brunswick Charter"). This enactment would declare and protect fundamental rights, democratic rights, legal or judicial rights, and economic, social and cultural rights in addition to the right to equal treatment and equal protection from discrimination as obtained by the existing New Brunswick Human Rights Code.

2.2 It is recommended that the United Nations International Bill of Rights, the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms serve as the models for the New Brunswick Charter.

2.3 It is recommended that the New Brunswick Charter incorporate fundamental human rights and the responsibility to respect and promote fundamental rights and freedoms.

2.4 It is recommended that the New Brunswick Charter incorporate democratic rights within its provisions, including a right to petition the Legislature directly or through the Office of the Ombudsman.

2.5 It is recommended that the New Brunswick Charter incorporate legal or judicial rights, including the right to a 'full and equal, public and fair hearing by an independent and impartial tribunal' and the right to be represented or assisted by an advocate - including legal counsel - before tribunals.

2.6 The recommendation respecting legal or judicial rights contemplates the appointment of decision-makers on the basis of an objectively determined merit system.

2.7 It is recommended that the New Brunswick Charter incorporate a right to the provision of legal counsel in cases involving fundamental rights and essential legal services. A significant part of this right is subsumed in the terminology of section 34 of the Quebec Charter.

2.8 The recommendation respecting legal representation contemplates that legal counsel may be provided by the provincial government in cases of greatest need.

2.9 It is recommended that the New Brunswick Charter incorporate economic, cultural and social rights within its provisions and, in particular, the right to education and training.

2.10 In the incorporation of education rights, it is recommended that recognition be given to the necessity of providing the resources to ensure that the right is a meaningful one for all persons. Legislative recognition should also be given to the importance of the promotion of human rights principles, and the unique bilingual status of New Brunswick's multicultural society.

2.11 It is recommended that the provincial government engage in consultation with New Brunswick's aboriginal peoples and the federal government, if appropriate, to determine the desirability and content of an aboriginal right to self-government which, to the fullest extent of provincial legislative competence, should be included in the New Brunswick Charter.

2.12 It is recommended that the New Brunswick Charter recognize a right to a healthy and sustainable environment.

2.13 It is recommended that the New Brunswick Charter contain a clause establishing that it is a supreme provincial enactment.

2.14 It is recommended that the New Brunswick Charter bind the Crown.

3.1 It is recommended that the New Brunswick Charter establish the New Brunswick Human Rights Commission as an independent legislative Office that reports to the Legislative Assembly through a Standing Committee on Human Rights.

3.2 It is recommended that the Executive Council of the Province establish a Committee on Human Rights, comprised of those of its members charged with responsibilities under the U.N. International Bill of Rights. The purpose of the Committee would be to a) co-ordinate the Province's compliance with the legal requirements of the U.N. International Bill of Rights; b) co-ordinate, with the advice of the Commission and other human rights agencies, the promotion and extension of respect for fundamental rights, freedoms and responsibilities, and c) assume the responsibility for the completion of New Brunswick's reporting duties under the U.N. International Bill of Rights.

3.3 It is recommended that the New Brunswick Charter confer on the Chair of the Commission the authority to consult with any member of the Executive Council of the Province.

3.4 It is recommended that the New Brunswick Charter provide that the mandate of the Commission shall be:

a) to further the recognition of the equality and dignity of all individuals;

b) to promote the principle that cultural diversity is a fundamental human value;

c) to promote and effect compliance with the Charter;

d) to review any law or policy with respect to conformity with the Charter;

e) to research and develop programs of public education;

f) to encourage and conduct research into human rights;

g) to advise the government on recommendations respecting human rights made by others;

h) to investigate complaints of discrimination and promote settlement or resolution of complaints;

i) to investigate systemic discrimination on its own initiative;

j) to promote or approve anti-discrimination programs of agencies or groups;

k) to recommend or approve affirmative action programs;

l) to perform further functions as required in the fulfillment of the Charter's mandate;

m) to report as required.

3.5 It is recommended that the Chair and Vice-Chair of the New Brunswick Human Rights Commission be appointed by the Lieutenant-Governor in Council on the legislative motion of the Premier and Leader of the Official Opposition.

3.6 It is recommended that members of the Commission other than the Chair and Vice-Chair be appointed by the Lieutenant-Governor in Council following consultation with groups and individuals interested and/or expert in the field of human rights.

3.7 It is recommended that the Chair, Vice-Chair and any member of the Commission be removable by the Lieutenant-Governor in Council only on address of the Legislative Assembly.

3.8 It is recommended that the New Brunswick Human Rights Commission comprise a Chair, Vice-Chair and five Commissioners.

3.9 It is recommended that the membership of the Commission be drawn from backgrounds that complement its promotional, educational and compliance functions, including educators, racial and other visible minorities, private business, labour, and the legal and other professions.

3.10 It is recommended that the Chair, Vice-Chair and Commissioners of the New Brunswick Human Rights Commission be part-time appointees.

3.11 It is recommended that the Chair, Vice-Chair and commissioners of the New Brunswick Human Rights Commission be appointed on a staggered basis for a fixed term (three or five years) and be eligible for a single reappointment.

3.12 It is recommended that the remuneration paid to the Chair, Vice-Chair and Commissioners of the New Brunswick Human Rights Commission be set at a reasonable level: Chair - minimum $26,250; Vice-Chair - minimum $175/day; Commissioners - minimum $100/day).

3.13 It is recommended that the methodology for remuneration of the Commission be reviewed and that a more equitable and rational system be instituted.

3.14 It is recommended that the New Brunswick Human Rights Commission be granted the authority to be self-administering with respect to staffing, budget and contractual functions. [This recommendation contemplates the conferral of corporate status on the Commission.]

3.15 It is recommended that the New Brunswick Human Rights Commission make the necessary arrangements with public and private authorities to ensure that its staffing, budget and contractual powers are exercised consistent with the attainment of independence and economy.

3.16 It is recommended that the New Brunswick Charter provide that the independence conferred upon the New Brunswick Human Rights Commission be complemented by the imposition of conflict of interest provisions with respect to the financial and other interests of the members and staff of the Commission.

3.17 It is recommended that the New Brunswick Human Rights Commission be empowered to delegate its administrative authority to members of the Commission - including the Chair, Vice-Chair or any sub-committee established by by-law or regulation.

3.18 It is recommended that the New Brunswick Human Rights Commission be empowered to delegate authority to its executive director or other senior directors, but that any decision made pursuant to a delegation of substantive authority shall be the subject of a full right of appeal to the Commission.

3.19 It is recommended that the New Brunswick Charter establish a reporting requirement for the New Brunswick Human Rights Commission similar to that of the Quebec and Yukon statutes and that consideration be given to explicit annual report components as set out in the Saskatchewan statute. Such a requirement contemplates that the annual report, in addition to having a public information and promotional value, will serve as a point of departure in relations between the Commission and the Legislature.

3.20 It is recommended that the New Brunswick Charter provide that the New Brunswick Human Rights Commission may make and publish special reports.

3.21 It is recommended that the New Brunswick Human Rights Commission be accorded regulation and by-law-making powers in order to meet the objectives of its legislation in an effective, efficient and remedial manner.

3.22 It is recommended that the New Brunswick Charter require that each member of the New Brunswick Human Rights Commission and each staff person of the Commission complete an oath of office or solemn affirmation.

3.23 It is recommended that the New Brunswick Charter confer a staffing authority on the New Brunswick Human Rights Commission.

3.24 It is recommended that the New Brunswick Charter provide for the appointment of an executive director of the New Brunswick Human Rights Commission, and set out the responsibilities of this position.

3.25 It is recommended that the New Brunswick Charter provide for the appointment of other directors and staff of the New Brunswick Human Rights Commission.

3.26 It is recommended that the New Brunswick Charter provide that the staff of the Commission be subject to the same general terms and conditions of employment as other public servants.

3.27 It is recommended that the New Brunswick Charter provide that staff of the Commission who are presently members of the Civil Service be permitted to retain this status.

4.1 It is recommended that the New Brunswick Charter provide for a general protection from discrimination analogous to that found in section 15 of the Canadian Charter of Rights and Freedoms and as set out in section 9 of the Manitoba Human Rights Code.

4.2 It is recommended that the New Brunswick Charter incorporate a definition of discrimination similar to that found in section 9 of the Manitoba Human Rights Code.

4.3 It is recommended that the New Brunswick Charter incorporate the fields of activity within which discrimination is prohibited in the present New Brunswick Human Rights Code, including the order of presentation in sections 3 to 7, the definitions in section 2 and the provisions in section 4(3) respecting restrictive covenants. In any re-casting of sections 3 to 7, it is suggested that the terminology contained in the Manitoba Human Rights Code and the Model Human Rights Act be consulted.

4.4 It is recommended that the New Brunswick Charter include 'contract' as a field of activity within which discrimination is prohibited.

4.5 It is recommended that the New Brunswick Charter provide that all contracts be deemed to include a clause prohibiting discrimination (as in Manitoba Code, section 56; Ontario Code, section 25).

4.6 It is recommended that the New Brunswick Charter and other provincial enactments include a provision to facilitate, through Crown contract, the promotion of human rights protection by the prohibition of discrimination, by the provision of reasonable accommodation and by affirmative action.

4.7 It is recommended that the New Brunswick Charter clarify the specified fields of activity by the addition of comprehensive definitions, including the definition of 'employer', 'employee', 'accommodation, goods, services or facility', 'licence' and 'education facility'.

4.8 It is recommended that consideration be given to the inclusion within the New Brunswick Charter of a specific right to equal treatment with respect to the fields of activity covered by the New Brunswick Charter.

4.9 It is recommended that the New Brunswick Charter confer on the New Brunswick Human Rights Commission the right to approve all requests for exceptions under the Statute, such power to include the conferral of a discretion in the Commission to issue an advisory opinion or guideline in an appropriate instance.

4.10 It is recommended that exceptions with respect to discriminatory practices be permitted with respect to a 'bona fide and reasonable requirement' or for 'bona fide and reasonable cause' (as in the Manitoba Code, s. 13(1), 14(4), 14(6), 15(1), 16(1) and 18).

4.11 It is recommended that the specific exemptions presently found in the New Brunswick Human Rights Code be omitted from the New Brunswick Charter.

4.12 It is recommended that the regulation-making power under the New Brunswick Charter enable the Lieutenant-Governor in Council, on the recommendation of the Commission, to formulate regulations with respect to exceptions. This regulation-making authority should define the terminology and criteria applicable to the determination of whether a qualification, requirement, limitation, specification, exclusion, denial, preference or differentiation is 'bona fide' and reasonable. Such regulations would be made with respect to the fields of activity under the Code, including:

- age, sex, disability and marital status discrimination in employment, occupancy and the provision of goods, accommodation, services and facilities;

- pension, insurance and other benefit plans;
- citizenship and other legal status under the Immigration Act (Canada);
- criminal charge/conviction/record relevant to employment;
- pre-employment inquiries and documentation in private residential employment;
- nepotism (employment of spouse, child or parent of employer or employee);
- private residential occupancy;
- functions, including composition, employment and publications of (non-profit) ethnic, religious, charitable, educational, social, cultural, philanthropic, political or educational institutions and organizations, including volunteer associations.

4.13 It is recommended that one or more Commission committees be struck - with power to add persons other than Commission members - in order to obtain the most effective exemption regulations.

4.14 It is recommended that an exemption regulation under the New Brunswick Charter provide for the delegation of the approval procedure to the executive director of the Commission.

4.15 It is recommended that, notwithstanding the requirement that an application for exemption be made in all cases, the Commission or a board of inquiry be vested with remedial authority to grant an exemption following the making of a complaint.

4.16 In order to ensure legislatively the recognition, promotion and protection of our multicultural heritage and to underscore New Brunswick's membership in the world family, it is recommended that the New Brunswick Charter prohibit discrimination on the basis of race, colour, national or ethnic origin, place of origin, ancestry and perceived race, colour and ancestry.

4.17 It is recommended that there be incorporated in the New Brunswick Charter an interpretive provision analogous to that contained in section 27 of the Canadian Charter of Human Rights and Freedoms and section 2 of the Yukon Human Rights Code, namely, that the New Brunswick Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of the residents of New Brunswick.

4.18 It is recommended that protection from discrimination on the basis of religion be extended and clarified under the New Brunswick Charter to include "religion or creed, religious belief, religious association or religious practices, observances or activities".

4.19 It is recommended that the New Brunswick Charter prohibit age discrimination.

4.20 It is recommended that the definition of 'age' in section 2 of the New Brunswick Human Rights Code be repealed.

4.21 It is recommended that the New Brunswick Charter provide that youth-based age discrimination be prohibited except in accordance with a statute in force in the Province.

4.22 It is recommended that sections 3(6)(a) and (b) of the New Brunswick Human Rights Code, which provide for age discriminatory pension and insurance plans, be repealed.

4.23 It is recommended that the Lieutenant-Governor in Council make regulations, on the recommendation of the New Brunswick Human Rights Commission, prescribing distinctions, conditions, requirements on qualifications that shall be deemed to be bona fide and reasonable in respect of employee pension, insurance or other benefit plans, whether provided by individual contract, collective agreement or otherwise (as in section 14(7) of Manitoba Code).

4.24 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of physical and mental disability pursuant to a comprehensive definition of disability as it is found in the Saskatchewan and Ontario statutes.

4.25 It is recommended that the definition of 'disability' avoid the use of terminology that may reinforce negative stereotypes about the disabled.

4.26 It is recommended that consideration be given to including in the definition of 'disability' a reference to AIDS as a specific example of a physical disability.

4.27 It is recommended that consideration be given to the inclusion in the definition of 'disability' a reference to dependence on alcohol and/or drugs as a specific example.

4.28 It is recommended that the concept of "reasonable accommodation" be incorporated into the New Brunswick Charter, the general application of which would have particular relevance to discrimination on the basis of disability. It is suggested that section 12 of the Manitoba Human Rights Code may serve to resolve much of the confusion which has resulted from the Bhinder and O'Malley decisions.

4.29 It is recommended that the New Brunswick Government immediately take steps to make its services more accessible to the disabled and that such steps be taken as part of a formal coordinated effort with private and public advocacy representatives.

4.30 It is recommended that the protection afforded on the basis of marital status be retained in the New Brunswick Charter.

4.31 It is recommended that the New Brunswick Charter incorporate a definition of 'marital status' similar to that found in section 9 of the Ontario Code.

4.32 It is recommended that the New Brunswick Charter retain and clarify the prohibition against sex discrimination by incorporating the definition used in the Manitoba statute, namely, "sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy".

4.33 It is recommended that consideration be given to reposing in a single governmental authority the administration of the implementation of equitable wages with respect to men and women.

4.34 It is recommended that the prohibition against sexual harassment be subsumed in the broader notion of "harassment" (see Recommendation 4.56 below).

4.35 It is recommended that the New Brunswick Charter prohibit discrimination with respect to the laying of a criminal charge against a person, a record of conviction, or for a pardoned offence "unless bona fide and reasonable cause exists for the discrimination".

4.36 It is recommended that the Lieutenant-Governor in Council, on the recommendation of the New Brunswick Human Rights Commission, make regulations to establish the criteria for establishing a bona fide exception with respect to this prohibition.

4.37 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of family status.

4.38 It is recommended that the New Brunswick Charter include a comprehensive definition of family status.

4.39 It is recommended that the New Brunswick Charter include a provision recognizing the equality of both official linguistic communities in New Brunswick and recognizing the duties which flow from that equal status as outlined in Bill 88.

4.40 It is recommended that the New Brunswick Charter recognize the multicultural character of each official linguistic community and recognize also the collective right of any linguistic, ethnic and religious groups to speak their own language, to enjoy their own culture and to practice their own religion.

4.41 It is recommended that the New Brunswick Charter make explicit reference to the duty which lies on the State to safeguard the enjoyment of human rights by positive measures aimed at the promotion and preservation of our linguistic, ethnic and religious minority communities, within limitations such as the desire and initiative of the minorities themselves, political stability, level of economic development and proportionality of costs and benefits.

4.42 It is recommended that the New Brunswick Charter include language as a proscribed ground of discrimination.

4.43 It is recommended that the New Brunswick Charter expressly include as one of its legal rights, the right to be heard in a court or tribunal in the official language of one's choice by a decision-maker who speaks and understands the official language chosen.

4.44 It is recommended that the New Brunswick Charter include a provision recognizing the right of access, in the official language of one's choice, to public service in the Province.

4.45 It is recommended that consideration be given to the inclusion in the New Brunswick Charter of a right to public schooling for one's children in the language of one's choice. Such a right would guarantee schooling in one's own language to all New Brunswick students whether their first language be English or French. It would also guarantee the right to immersion schooling where the parents desire their child's second official language to be the language of instruction.

4.46 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of nationality or citizenship.

4.47 It is recommended that section 7(2) of the New Brunswick Human Rights Code, dealing with citizenship prerequisites of association membership, be repealed.

4.48 It is recommended that "place of residence" be included as a prohibited ground of discrimination under the New Brunswick Charter.

4.49 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of political belief.

4.50 It is recommended that with respect to discrimination on the basis of political belief, the Lieutenant-Governor in Council, on the recommendation of the New Brunswick Human Rights Commission, make regulations to establish the criteria for establishing a bona fide exception with respect to this prohibition.

4.51 It is recommended that consideration be given to the inclusion in the New Brunswick Charter of the prohibition of discrimination on the basis of seizure of pay.

4.52 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of sexual orientation.

4.53 It is recommended that consideration be given to the inclusion of social condition or social origin as a prohibited ground of discrimination in the New Brunswick Charter.

4.54 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of "source of income".

4.55 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of actual or presumed association with an individual or a group that is subject to a proscribed form of discrimination.

4.56 It is recommended that the New Brunswick Charter prohibit harassment with respect to all fields of activity and grounds of discrimination in a similar manner to that provided under section 19 of the Manitoba Code.

4.57 It is recommended that further study and consideration be given to the inclusion of a provision in the New Brunswick Charter similar to section 13 of the Canadian Human Rights Act, which would properly balance the right to be free from group defamation with the right to free speech.

4.58 It is recommended that the New Brunswick Charter prohibit publicity that encourages any violation of its provisions (as in section 12 of the Canadian Human Rights Act).

4.59 It is recommended that the New Brunswick Charter prohibit reprisal in a manner similar to section 20 of the Manitoba Code.

5.1 It is recommended that expediency of complaint resolution be retained as a preeminent objective of the New Brunswick Human Rights Commission.

5.2 It is recommended that the objectives of expediency of and integrity within the Commission's complaint-handling procedure be met by maintaining, but redefining, the compliance and educational/ promotional functions.

5.3 It is recommended that the Commission further develop a complaint response structure that combines the roles of investigator and conciliator upon receipt of a complaint in order to effect speedy settlement.

5.4 It is recommended that, upon non-settlement at the receipt level within a relatively fixed period of time, the roles of investigator and conciliator be assigned to two different human rights officers who, in a given investigation, may assume the role of investigator or conciliator, but not both.

5.5 It is recommended that the role of receipt officer be assumed by human rights officers on a rotational basis or by persons hired for such a specific receipt function.

5.6 It is recommended that the implementation of a toll-free telephone service, facsimile service and fast mail be considered as means to facilitate the complaint procedure.

5.7 It is recommended that the present emphasis on staff training be continued and increased, by participation in conciliation/alternative dispute resolution training and more traditional learning formats, with particular emphasis on intensifying the Commission's participation in the training initiatives of the Canadian Association of Statutory Human Rights Agencies (CASHRA) and the Canadian Human Rights Foundation.

5.8 It is recommended that any person, group, association or corporation have standing to complain to the Commission on their own behalf or on behalf of another person (including a minor) with respect to a prohibited form of discrimination.

5.9 It is recommended that the Commission - including its executive director - have standing to make a complaint on its own motion.

5.10 It is recommended that the Commission have the authority to require that the consent of a person be obtained prior to the commencement of an investigation.

5.11 It is recommended that a person be able to initiate a complaint before a judge of The Court of Queen's Bench of New Brunswick.

5.12 It is recommended that the New Brunswick Charter provide that the Commission may require that a complaint be in writing.

5.13 It is recommended that a complaint form be written in plain, everyday language; and as much as possible in other formats such as braille which will accommodate the individual needs of persons making the complaint.

5.14 It is recommended that the New Brunswick Charter provide that the Commission may receive complaints in other forms and/or media than a written form.

5.15 It is recommended that the New Brunswick Charter establish a one-year time limit for the making of a complaint.

5.16 It is recommended that the New Brunswick Charter provide that the Commission or its executive director may extend this time limit so long as the extension would not cause undue prejudice to a respondent.

5.17 It is recommended that, with respect to investigative powers, the present provision contained in section 19 of the New Brunswick Human Rights Code be amended to conform with a provision similar to section 28.1 of the Saskatchewan Code.

5.18 It is recommended that the New Brunswick Charter incorporate explicit settlement provisions, modelled after those found in section 42 of the Ontario Code.

5.19 It is recommended that the New Brunswick Charter provide that the Commission be empowered to publish the results of a settlement.

5.20 It is recommended that the New Brunswick Charter provide that the Commission may dismiss a complaint if in its opinion it:

a) will more readily be dealt with in another forum;

b) is outside its jurisdiction;

c) is trivial, frivolous, vexatious or made in bad faith;

d) is made beyond the time limit recommended above;

e) is based on conduct respecting which an exemption would have been granted, even if such an exemption was not granted at the time of the conduct;

f) is otherwise, for reasons stated by the Commission, without merit.

5.21 It is recommended that the New Brunswick Charter provide that the Commission shall give written reasons, including a summary of the facts upon which such reasons are based, with respect to the dismissal of any complaint.

5.22 It is recommended that the New Brunswick Charter incorporate provisions to ensure that procedural fairness is extended to the complainant(s) and the respondent(s) throughout the complaint procedure.

5.23 It is recommended that the New Brunswick Charter provide for the appointment of a panel of adjudicators, comprised of a chief adjudicator and ten adjudicators.

5.24 It is recommended that the panel members be selected by the Lieutenant-Governor in Council on the basis of a history of familiarity with and sensitivity to human rights issues.

5.25 It is recommended that the selection of particular adjudicators to a board of inquiry be made by the chief adjudicator on a rota basis at the instance of the New Brunswick Human Rights Commission.

5.26 It is recommended that the fees to be paid to a board of inquiry adjudicator be fixed by regulation.

5.27 It is recommended that the New Brunswick Charter provide that, as in section 22(4) of the Newfoundland Code, when the Commission declines to refer a complaint to a board of inquiry, the complainant be empowered to apply to The Court of Queen's Bench of New Brunswick for an order that the Commission refer the complaint to a board of inquiry.

5.28 It is recommended that the New Brunswick Charter provide that the parties to a board of inquiry be as set out in section 20(4.1) of the present New Brunswick Human Rights Code.

5.29 It is recommended that the New Brunswick Charter establish that the Commission shall have carriage of the complaint before a board of inquiry.

5.30 It is recommended that, as a matter of practice, the Commission not pay the costs of a complainant's legal counsel, if any.

5.31 It is recommended that a board of inquiry appointed under the New Brunswick Charter be accorded the powers of a Commissioner under the New Brunswick Inquiries Act.

5.32 It is recommended that the New Brunswick Charter, or a board of inquiry procedure regulation made pursuant thereto, incorporate the following minimum fair procedural provisions:

- notice of hearing;
- right to be heard;
- right to counsel;
- right to adduce evidence;
- evidentiary powers of tribunal;
- evidence taken on oath or affirmation;
- disclosure of information;
- written decision with reasons;
- notice of decision;
- record of proceedings;
- rules of evidence;
- adjournment;
- interim relief;
- consolidation of proceedings.

5.33 It is recommended that the Commission prepare a 'Hearing Checklist' similar to the one distributed by the British Columbia Council on Human Rights, to assist all parties appearing before a board of inquiry.

5.34 It is recommended that a board of inquiry appointed by the Commission be conferred with jurisdiction to interpret and apply the Canadian Charter of Rights and Freedoms.

5.35 It is recommended that the New Brunswick Charter provide that a board of inquiry be empowered to order any party who has contravened the Charter to comply with the Charter and/or make rectification for the contravention. This order may include any of the following elements:

- to act or to cease to act;
- to pay restitution;
- to provide access or other amenities for the disabled;
- to pay damages of either a general, special or exemplary nature;
- to cease and rectify an offending harassment;
- to make available the opportunity denied to the complainant;
- to adopt an affirmative action program,
- to pay costs;
- to take whatever other action the board considers appropriate.

5.36 It is recommended that the New Brunswick Charter provide that a party may appeal from a decision of a board of inquiry by way of application to The Court of Queen's Bench of New Brunswick:

- with a transcript of all proceedings;
- in accordance with the Rules of Court;
- upon a question of law or a question of fact or of mixed law and fact;
- within 60 days of the service of the board's decision;
- with or without leave.

5.37 It is recommended that the New Brunswick Charter confer a costs power on a board of inquiry, including the power to award costs to a complainant and, as in s.40(6) of the Ontario Human Rights Code, where, upon dismissing a complaint, the board of inquiry finds that the complaint was trivial, frivolous, vexatious or made in bad faith or has caused undue hardship to the respondent, the board may order the Commission to pay the respondent's costs.

5.38 It is recommended that the New Brunswick Charter retain the enforcement procedures presently found in the New Brunswick Human Rights Code.

5.39 It is recommended that references to the "Minister of Labour" in the New Brunswick Human Rights Code's enforcement provisions be replaced by references to "the Commission".

5.40 It is recommended that more specifically worded offences be established under the New Brunswick Charter.

5.41 It is recommended that the penalties attendant upon a conviction under the New Brunswick Charter be increased to reflect the pre-eminent status of the rights protected under the Charter; and that the penalties set out in the New Brunswick Provincial Offences Procedure Act for a category I offence be appropriate.

5.42 It is recommended that there be incorporated in the New Brunswick Charter an 'onus of proof' provision similar to that contained in section 52 of the Manitoba Human Rights Code with respect to proceedings before a board of inquiry or the Commission.

5.43 It is recommended that a 'slip rule' be incorporated in the New Brunswick Charter similar to that found in section 61 of the Manitoba Human Rights Code.

5.44 It is recommended that the New Brunswick Charter provide that evidence respecting the Commission's conciliation function be protected from disclosure.

5.45 It is recommended that an explicit right of access to information, including personal information, be incorporated in the New Brunswick Charter and/or the New Brunswick Right to Information Act.

5.46 It is recommended that the New Brunswick Charter incorporate a statutory immunity provision similar to that found in section 32 of the Newfoundland Human Rights Code.

5.47 It is recommended that the New Brunswick Charter provide that a "court privilege" be extended to the proceedings before the Commission similar to that found in section 28(2) of the British Columbia Ombudsman Act.

5.48 It is recommended that the New Brunswick Charter incorporate a non-compellability provision similar to section 29 of the Ontario Human Rights Code. This provision may extend to non-jurisdictional proceedings as in the subsection 24(2) of the New Brunswick Ombudsman Act.

5.49 It is recommended that the New Brunswick Charter incorporate the protection of section 13 of the Canadian Charter of Rights and Freedoms (see also Recommendation 2.6).

5.50 It is recommended that the New Brunswick Charter incorporate a statutory protection for those persons who comply with the provisions of the Charter.

5.51 It is recommended that the New Brunswick Charter provide that the Lieutenant-Governor in Council, on the recommendation of the New Brunswick Human Rights Commission, be empowered to make regulations.

5.52 It is recommended that this regulation-making power set out the types of regulations that may be made under the Charter, including those relating to:

- complaint initiation and disposition;
- boards of inquiry procedure;
- exemptions;
- special (affirmative action) programs;
- physical assistance to the disabled;
- definition and form-making authority; and
- a general regulation-making authority.

(see also Recommendations 3.17, 3.21, 4.12, 4.23, 4.36, 4.50, 5.26 and 5.32.)

CHAPTER ONE

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CHAPTER ONE

THE HISTORICAL AND LEGAL FOUNDATIONS FOR A COMPREHENSIVE HUMAN RIGHTS CODE

I. Introduction

The present New Brunswick Human Rights Code is representative of anti-discrimination legislation that exists in Canada's thirteen political jurisdictions.[1] With the exception of the Quebec Charter of Human Rights and Freedoms and, to a lesser extent, the Saskatchewan and Yukon Human Rights Codes, these instruments are limited to protecting individuals from proscribed types of discrimination that occur in specified fields of human activity. The respective legislation creates a complaint handling mechanism and, with the exception of the Northwest Territories, a statutory human rights agency to oversee the complaint handling process. These same statutory human rights agencies are conferred with broad promotional and educational responsibilities that derive as much from the historical and legal foundations of the codes as from the statutory instruments themselves.

The preamble of the New Brunswick Human Rights Code suggests that its purpose is to "guarantee the fundamental equality of all persons in dignity and human rights" by the rule of law, and that the role of the New Brunswick Human Rights Commission is to "forward the principle that every person is free and equal in dignity and rights without discrimination". Such language would strongly suggest that the Code has a significant enforcement and promotional function similar to the United Nations International Bill of Rights. This is because it speaks in the terminology of the Bill's components, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the latter Covenant.[2]

The adoption of the Canadian Charter of Rights and Freedoms[3] - in particular, section 15 of the Charter - and its judicial interpretation have given rise to questions as to the constitutionality of some of the more restrictive provisions of the provincial human rights codes. In effect, the Charter has become a challenge for the adoption of more remedial human rights legislation.

The conferral in human rights legislation of relatively narrow substantive authority within such a broad remedial context represents a denial not only of the promise of equality, but also an inadequate response to New Brunswick's obligations under the U.N. International Bill of Rights and the Canadian Charter of Rights and Freedoms.

The historical overview that follows permits a concise explanation of the history of equality, the failure of Canada's initial response to British and American legal precedents and the exciting challenge posed by the U.N. International Bill of Rights and the Canadian Charter of Rights and Freedoms.

II. A Brief History of Equality

The statutory precursors of modern human rights legislation first appeared approximately 200 years ago in the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen. However, the notion of the recognition of human rights, to which the equality of all persons is central, can be traced to the Greek philosophers and the world's major religions.

The idea of equality dates at least to Aristotle who considered it to be inherent in the notion of justice.[4] For him, equality and therefore justice, requires that persons who are equal should be treated equally and persons who are not equal should not be treated equally. This basic Aristotelian notion, stated in terms such as "alike cases should be treated alike", has come to be known as "formal equality".

Equality has also been propounded as a fundamental tenet of major religious groups. The Judeo-Christian tradition recognizes that all persons are equal in the eyes of God, notwithstanding their earthly inequalities. The second of the two cornerstones of this tradition, the requirement to love one's neighbour as oneself, stems directly from this notion. Similarly, the Islamic tradition commands those who believe in God to act kindly toward their neighbours. The notion of equality is perhaps most poignantly expressed by the following belief of Hinduism that "one who, with equality, sees oneself in all beings and all beings within oneself attains to the state of self-rule". Such religious beliefs continue to have a profound impact on the institutions and lives of many New Brunswickers.

The concept of equality of human dignity and human rights also found justification in the philosophical writings of Locke and Rousseau. To them, the basic equality of humanity derived from "a state of nature", a spirit of historic antecedents that combined in a justification for both the American Declaration of Independence and the Declaration of the Rights of Man and the Citizen.

III. The Canadian Bill of Rights and its Antecedents

Two nineteenth century pronouncements, the Fourteenth Amendment to the American Bill of Rights[5] and the writings of Professor A.V. Dicey, represent both an extension and a limitation on the concept of equality. The Fourteenth Amendment, which is sometimes referred to as the "new constitution" of the United States, was enacted in 1868 in an effort to establish by legislation the full and equal status of all races. Regrettably, the requirement of "equal protection of the laws" for all Americans was initially interpreted in a very restricted fashion by the U.S. Supreme Court in its adoption of the "separate but equal" doctrine.[6] Later, the Court abandoned this doctrine in *Brown* v. *The Board of Education*[7] which is regarded as signalling the "emerging primacy of equality as the guide to constitutional decisions".[8]

The notion of "equality before the law" as a cornerstone of British constitutional democracy was eloquently enunciated by Professor A.V. Dicey in the mid-nineteenth century.[9] As interpreted by twentieth century Canadian courts, this principle is of only limited egalitarian value. Dicey's notion of equal subjection of all persons to the ordinary laws of the land administered by the ordinary courts is basically a procedural concept relating to the operation of the legal system.

One manifestation of the evolutionary development of human rights concepts is reflected in the Canadian Bill of Rights,[10] a 1960 enactment which attempted to combine the approaches of the Fourteenth Amendment and Dicey through its paragraph 1(b):

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion and sex, the following human rights and fundamental freedoms, namely,
>
> . . .
>
> (b) the right of the individual to equality before the law and the protection of the law.

In *R.* v. *Drybones*,[11] a landmark remedial decision under the Bill of Rights, it was established that "no individual or group of individuals is to be treated more harshly than another under that law".[12] Unfortunately, the promise of Drybones was not kept in subsequent cases. In particular, the cases of A.G. of Canada v. Lavell,[13] and Bliss v. A.G. of Canada[14] limited the interpretation of paragraph 1(b) of a law whose application was, in any event, limited to the federal sphere of governmental activity. In Lavell, the egalitarian concept of the Fourteenth Amendment was specifically limited by an acceptance only of the procedural notion of equality before the law. Similarly, Bliss rejected the notion that the protection of the law should guarantee "the equal benefit of the law", which some had argued was inherent in the notion of "equality before the law".

While it is arguable that the notions of "equality under the law" and "equal benefit of the law" equate with that of "equal protection of the law", the drafters of section 15 of the Canadian Charter of Rights and Freedoms wisely incorporated both of these notions with the two that form part of the Canadian Bill of Rights. The reluctance of the Supreme Court of Canada to look beyond a "valid purpose" in the assessment of unequal treatment under federal statutes was followed by the establishment of a much higher test - that of demonstrable justifiability - under section 1 of the Canadian Charter Rights and Freedoms.

The narrow interpretation given by the Supreme Court of Canada to the Canadian Bill of Rights was typical of the restrictive interpretation which Canadian courts often brought to questions of human rights. Two of Canada's leading human rights commentators, Mr. Justice Walter Tarnopolsky and Mr. William Pentney, have concluded that the judicial experience was

> no inspiration in attempting to achieve an egalitarian society. It is no wonder then that the legislatures, with no aid from the judiciary, had to move into the field and start to enact anti-discrimination legislation, the administration and application of which have largely been taken out of the courts.[15]

IV. The United Nations International Bill of Rights

The development of modern international human rights law may be attributed to the monstrous violations of human rights of the Hilter era and the belief that these violations might have been prevented had there existed an effective international system for the protection of human rights.

Article 55 (c) of the United Nations Charter[16] requires its signatories, including Canada, "to promote ... universal respect for an observance of human rights and fundamental freedoms".

This provision cloaked the U.N. Member States with the authority to adopt an International Bill of Rights and thereby to give definition to the phrase "human rights and fundamental freedoms".

These basic human rights instruments in international law are the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol. Canada is a signatory to the Universal Declaration and pursuant to a federal-provincial agreement[17] has ratified the Covenants and the Optional Protocol in 1976. The two covenants are legally binding instruments whereas the Declaration is, as the name indicates, a declaratory instrument but one which nonetheless is viewed by the international courts of justice as persuasive evidence of international custom. Any failure by the Government of New Brunswick to ensure respect for the provisions of the Covenants will place Canada in breach of its international legal obligations.

In addition to these four global human rights instruments, collectively called the U.N. International Bill of Rights, Canada is also a signatory to other major human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination (1965)[18] and the Convention on the Elimination of All Forms of Discrimination against Women (1979).[19] Canadian human rights legislation has also been inspired by regional human rights conventions, including the European Convention for the Protection of Human Rights and Fundamental Freedoms[20] and the Inter-American Convention on Human Rights.[21]

In establishing more than two dozen heads of universal human rights and fundamental freedoms, the U.N. International Bill of Rights establishes a philosophical and legal basis for the recognition and protection of human rights. It says that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". Further, it is declared that everyone is entitled to the rights and freedoms in the Declaration and Conventions "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Moreover, each of the signatories, including Canada, has agreed to "strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance".

The United Nations has, over the years, succeeded in clarifying and extending the scope of the Member States' obligations to promote human rights by creating remedial procedures and institutions designed to ensure compliance. The work of the U.N. Commission on Human Rights, the reporting under the International Covenant on Economic, Social and Cultural Rights and the promotion of regional human rights initiatives are examples of this effort.

As a result, the U.N. International Bill of Rights has a moral status and a legal and political importance that extends to New Brunswick.

V. The Canadian Charter of Rights and Freedoms

A) Introduction

The Canadian Charter of Rights and Freedoms is a part of the Constitution of Canada. As such, it represents the most fundamental component of the national law. It delineates the values we view as most important and guard most closely. It may not be altered or amended by any provincial legislation. A primary object of the Charter is to provide judicial vigilance over the protection and furtherance of human rights within the realm of governmental activity. This constitutional enshrinement of values promotes more vigilant protection of human rights by provincial legislatures. Indeed, the Charter demands such vigilance in section 52(1):

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

B) Interpretation

The Supreme Court of Canada has made definitive statements about correct Charter interpretation. First, there must be an underlying cognizance of the object of the Charter - the protection of rights that Canadians deem fundamental. Second, the Court takes notice of the language used by the framers. Third, reference must be made to the historical origin of the document.[22] An example of such an historical reference is found in a decision of the Saskatchewan Court of Appeal, which referred to the International Covenant on Civil and Political Rights and quoted from the United Nations Declaration of the Rights of Disabled Persons. The Court concluded that "(t)he protection and enforcement of human rights has increasingly become an important national and international goal."[23] Fourth, the Supreme Court of Canada has acknowledged that constitutional interpretation must take account of the very nature of a constitutional document. In Hunter v. Southam Inc.[24], the Chief Justice quotes the English Court of Appeal's pronouncement that the constitution is a document "sui generis, calling for principles of interpretation of its own, suitable to its own character".[25] In short, the highest court has endorsed a broad, purposive analysis and application of the Charter.

The status of provincial human rights legislation has ascended in this age of the Charter. Indeed, the Supreme Court of Canada in Winnipeg School Division No. 1 v. Craton[26] elevated human rights codes above regular statutes and by doing so indicated a preference for individual human rights above broader social policies.[27]

C) Relevance of the American Experience

The Fourteenth Amendment to the U.S. Constitution provides that:

> No state ... shall ... deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In contrast to the Canadian Charter, the Fourteenth Amendment (which is referred to as the "equal protection clause") does not extend protection to enumerated grounds of discrimination nor does it contain a provision comparable to the Charter's section 1. Nonetheless, the Fourteenth Amendment is a source from which section 15 originates, and to which the Canadian judiciary frequently refers.[28]

American courts have interpreted the Fourteenth Amendment on the basis of three levels of scrutiny; minimal, intermediate and strict. The Supreme Court of Canada views the Fourteenth Amendment as establishing that "the burden of sustaining an equal protection challenge is much heavier in some cases than in others. Racial classifications, which are subjected to strict scrutiny, are presumptively invalid because there is seldom, if ever, any legitimate reason for treating citizens differently because of their race. On the other hand, most economic classifications are presumptively valid because they are a necessary component of most regulatory programs."[29]

Consideration of a 'valid legislative objective' is also important to Canada's judicial treatment of equality rights. If such an objective is deemed to exist, it is more likely that resulting inequities may not be contrary to section 15. However, the 1989 Supreme Court decision in Andrews v. Law Society of British Columbia,[30] suggests that validity of purpose is not to weigh heavily in the assessment of constitutionality. The Court held that validity of purpose could not necessarily save legislation which created inequality, even if the inequality was not of the most deleterious sort.

The judgment expressly rejected the test applied in several lower court decisions which had decided that [only those] 'similarly situated should be similarly treated'. MacIntyre, J. said that such a test could constitute a blueprint for inequality, since the Nazis could have described their treatment of Jews as equal under this definition.[31] Stronger language could not have been used to dismiss a test that the Court itself used in Bliss v. Attorney-General of Canada[32]. MacIntyre, J. decided that it is imperative that courts consider those to whom the law will apply vis-à-vis those who will be excluded from the application of a particular law:

> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law - and in human affairs an approach is all that can be expected - the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of the irrelevant personal differences have a more burdensome or less beneficial impact on one than another.[33]

La Forest J., writing separately in Andrews, explicitly confirmed the importance of judicial deference in Charter interpretation, saying "the court's ... role is to protect against incursions on fundamental values, not to second guess policy decisions."[34] In making this point, he affirmed the rationale of an American case which decided that intervention on the basis of equality rights is a judicial last resort.[35] Mr. Justice La Forest also relaxed the scrutiny to be applied to legislation when he said that "all legislative classifications need not be rationally supportable before the courts".[36]

The foregoing establishes that, although the interpretive method appropriate to constitutional interpretation is broad and liberal, it is not without limit.

D) Section 15(1)

Section 15(1) of the Charter provides that:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

There are four guarantees of equality in the Charter: equality before the law; equality under the law; the right to the equal protection of the law and the right to the equal benefit of the law without discrimination. As noted above, this comprehensive language was largely predicated on the failings of the Charter's predecessor, the Canadian Bill of Rights.

These guarantees are extended 'without discrimination' in general. They are also extended, in particular, without discrimination, on the basis of the enumerated grounds. The enumerated grounds are not exhaustive. In the words of Mr. Justice MacIntyre, "[B]oth the enumerated grounds themselves and other possible grounds of discrimination... must be interpreted in a broad and generous manner, reflecting the fact that they are... intended to provide a continuing framework for the legitimate exercise of governmental power and, at the same time, for the unremitting protection of equality rights."[37]

The Supreme Court of Canada has also indicated the groups it considers analogous to those specifically enumerated: those lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending".[38] If New Brunswick's human rights legislation is to be in congruence with the Charter, it must protect the rights of such groups of people.

E) Other Relevant Charter Provisions

There are other components of the Charter which delineate rights which provinces should safeguard in the provincial context.

In section 6 of the Charter, there is a "mobility right". Given this precedent, the Province would be acting in congruence with the spirit of the Charter if it prohibited differentiation among job applicants on the basis of their places of residence.[39]

Sections 16 to 21 of the Charter underline the critical importance of language rights in the legal fabric of Canada. The protection of both official languages is stated in strong terms by the declaration that both English and French are of equivalent status. Section 23 furthers this entrenched value by guaranteeing the educational rights of minorities of significant number.[40]

Finally, section 15(2) of the Charter provides that:

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

While affirmative action programs might be viewed as an exception to the notion of equality enunciated in section 15(1), its inclusion confirms the recognition - also enunciated in the International Convention on the Elimination of all Forms of Racial Discrimination - that temporary affirmative action programs and preferential quota systems are lawful, provided they are designed to remedy the consequences of past discrimination and do not themselves foster discrimination.[41]

Sections 22 and 27 ensure that the Charter will be interpreted as not simply preserving but also enhancing the multicultural nature of the Canadian mosaic. Likewise, some of the enumerated heads of the equality section guarantee equal treatment of all, regardless of race or origin. Taken together, these provisions emphasize that Canada is increasingly a microcosm of the global community and they direct a commitment to the full and equal partnership of all the cultures which comprise Canada.[42]

It is noteworthy that the framers of the Canadian Charter enshrined an additional provision which explicitly guarantees rights and freedoms equally to males and females. The equality provision in section 28 is in addition to the prohibition against discrimination on the basis of sex contained within section 15. The use of such a particular guarantee strongly suggests a legislative approach to one of the more pressing and current social and human rights challenges.[43]

F) Section 1

Section 15 of the Canadian Charter must be read in conjunction with section 1, which provides that:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In the determination of whether discrimination has occurred under section 15, the onus of proving the inequality is upon the aggrieved party who is challenging the law or its application. If an infringement under section 15 is found, it may nonetheless be upheld, if it is determined to be reasonable under section 1. The burden of proof rests upon the government to establish that the law is demonstrably justified. In the opinion of Chief Justice Dickson, this burden is an onerous one, since section 15 is designed to protect those groups that suffer disadvantage.

The Supreme Court of Canada decision in R. v. Oakes[44] sets out the criteria for successfully invoking section 1 of the Charter. The onus is upon the party seeking to uphold the limitation; the standard of proof is a balance of probabilities. Two substantive inquiries must be answered positively. First, is the objective to be served of sufficient importance to override a constitutionally enshrined right? This requires that the objective relate to societal concerns which are pressing and substantial in a free and democratic society. Second, are the means proportional? The measures must be rationally connected to the objective, impair the rights in question as little as possible, and show a proportionality between deleteriousness of effect and importance of objective.

In Andrews[45], the Supreme Court of Canada held that non-Canadian barristers are discriminated against by the Barristers Act of British Columbia. The majority decided that the objective of the Act was not sufficiently pressing to merit being upheld by the section 1 exclusion. A minority dissent held that the citizenship requirement was sustainable under section 1 on the basis that it was reasonable and not prohibitive that citizenship be a requisite part of the practice of law in Canada.

The Supreme Court of Canada's interpretation of section 1 has particular relevance to the legality of the qualifications or limitations on equality under human rights codes. The Court has held that these limits must be measured against the equality guaranteed by the Charter, and are qualified only by what is reasonable in a democratic society. The Supreme Court has said that bona fide occupational qualifications should "in principle, be interpreted restrictively since they take away rights which otherwise benefit from a liberal interpretation".[46] The Supreme Court had also adopted this characterization of what is required to establish such a reasonable exception, namely, "the distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment, relates to professional and technical competence."[47]

Finally, the highest court has recognized the implicit difference in limitations between the human rights statutes and the Charter. "[W]here a defence is allowed, [a Human Rights Act] speaks in absolute terms and the discrimination is excused. [However, under the Charter] a further step will be required in order to decide whether a discriminatory law is justified under section 1."[48] This does not mean the nature of the limitations should be different; the limitations operate differently, but should be grounded in the same considerations.[49]

VI. The New Brunswick Human Rights Code

Mr. Justice Tarnopolsky notes that while the Canadian Charter of Rights and Freedoms reflects that "the constitutional enactment is a shield", he also asserts that "the victim of discrimination needs a sword as well. That sword is legislation that forbids discrimination".[50]

The development of human rights codes in Canada has evolved through three stages:

a) the passage of quasi-criminal legislation, including the Ontario Racial Discrimination Act and the Saskatchewan Bill of Rights, which protected individuals from specified forms of discrimination through the imposition of penal sanctions;

b) the passage of anti-discrimination legislation with respect to employment, accommodation and pay which was designed to improve the defects contained in quasi-criminal statutes by establishing administrative rather than quasi-criminal remedies. In New Brunswick, this initiative was manifested in the Fair Employment Practices Act,[51] the Fair Accommodation Practices Act[52], and the Female Employees Fair Remuneration Act.[53] Although this legislation conferred on public officials the administration of the complaint procedure including investigation, conciliation and settlement "it continued to place the whole emphasis of promoting human rights upon the individual who suffered most and who was therefore in the least advantageous position to help himself. The result was that very few complaints were made, and very little enforcement was achieved.";[54]

c) the adoption of comprehensive human rights codes administered by human rights commissions. The New Brunswick Human Rights Commission[55], established some six years after that of Ontario, created an approach to human rights protection whereby individual acts of discrimination were treated as part of an overall problem.

The early Acts were administered by an unspecified provincial 'officer'. The more broadly-based and public enforcement of the Human Rights Code by the New Brunswick Human Rights Commission "ensures community vindication of the person discriminated against! This is justified as being as important to the community itself because of the broad educational value of equal treatment, as it is to the victim of discrimination".[56]

The New Brunswick Human Rights Act was first mentioned in the March 14, 1967 Throne Speech as part of a comprehensive "Program for Citizens and Community".[57] This program, which was designed to complement the Province's Program of Equal Opportunity, included the establishment of the Department of Justice, the New Brunswick Housing Corporation, the Provincial Consumer Bureau, the Provincial Translation Bureau and the Office of the Ombudsman.[58] The government of the day foresaw a human rights act that would "ensure that no citizen suffers discrimination by virtue of race, colour or religion".[59] In presenting the Human Rights Act for first reading, the Minister of Labour stated that "it is expected that the declaration of the Human Rights Act will create an awareness that individuals, regardless of race, colour, national origin or religion, have rights which may not be infringed upon lightly. The principle that every person is free and equal in dignity and in rights will be furthered by the passage of this Bill."[60]

The Human Rights Act[61] of 1967 protected persons from discrimination on the basis of race, creed, colour, nationality, ancestry or place of origin with respect to employment, vocational membership, services and discriminatory publications. The Commission established under the Act had the authority to investigate complaints, to recommend to the Minister of Labour the establishment of a board of inquiry to take action on the basis of a board of inquiry's findings and to administer the Act through the Department of Labour. The legislation provided penal sanctions for those who did not follow its requirements.

Section 7 of the original Act described the functions of the Commission as follows:

(a) to forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, nationality, ancestry or place of origin;

(b) to promote an understanding of, acceptance of and compliance with this Act; and

(c) to develop and conduct educational programmes designed to eliminate discriminatory practices related to race, creed, colour, nationality, ancestry or place of origin.

These basic functions have remained unchanged to the present day.

In 1971, the Human Rights Act was repealed and reenacted as the New Brunswick Human Rights Code. The 1971 amendments provided for protection from age, sex and marital status discrimination and extended the Code's application to the occupancy and real estate fields. It also established a more comprehensive delineation of the bases upon which the proscribed forms of discrimination were subject to the Code. Finally it more clearly defined the respective roles of boards of inquiry, the Commission and the judiciary with respect to enforcement.

The 1971 Code has been amended on eight occasions, including: (with the denotation of the types of changes effected):

a) S.N.B. 1974, c. 20 (Supp.) - "or causes to be published" added with respect to the prohibition against discriminatory employment advertisements;

b) S.N.B. 1976, c. 31 - physical disability added as a prohibited form of discrimination;

c) S.N.B. 1979, c. 41, s. 63 - change consequential upon the merger of the Supreme and County Courts of New Brunswick;

d) S.N.B. 1983, c. 30, s. 14 and S.N.B. 1986, c. 8. s. 57 - changes consequential upon name changes of the Department of Labour;

e) S.N.B. 1985, c. 30 - mental disability added as a prohibited form of discrimination; gender discriminatory language replaced; board of inquiry decision instead of recommendation with consequential removal of decision- making power by Commission; board of inquiry procedure;

f) S.N.B. 1988, c. E-9.2 and S.N.B. 1988, c. 6, s. 23 - application of Entry Warrants Act to the Human Rights Act, requiring application to a judge for permission to exercise any of the powers set out in section 19 of the Human Rights Code.

g) S.N.B. 1987, c. 26 - prohibition of sexual harassment; consequential definitions.

Although the New Brunswick Human Rights Code was conceived as an integral part of a comprehensive human rights program consistent with Canadian international legal obligations and the concept of "equality of opportunity" enunciated in the Province's Program of Equal Opportunity, the Code's legislative structure was that of an amalgam of pre-existing labour statutes. Notwithstanding the 1971 revision, the Code remains a patchwork of responses to human rights and legal procedural concerns of the past two decades.

VII. Conclusion

A historical perspective enables an understanding of the antecedents to the New Brunswick Human Rights Code. The Code is a legal by-product of a global struggle for the protection of human rights and, in particular, the protection of individuals from invidious and irrational discrimination.

This struggle has culminated in the enactment of the United Nations International Bill of Rights, the Canadian Charter of Rights and Freedoms and the New Brunswick Human Rights Code. As the Supreme Court of Canada has concluded in the case of Singh v. Minister of Manpower and Immigration[62], the rights granted under human rights enactments cumulatively impact on the protection of fundamental human rights.

The New Brunswick Code was enacted in response to the broad moral and legal obligations created under the U.N. International Bill of Rights. The fundamental human rights of the Code received a renewed pre-eminence upon the enactment of the Canadian Charter. Now, the protection of fundamental human rights in the province must be reconfirmed in a manner consistent with the broader commitments of both the national and international communities.

END NOTES

1. The Canadian Human Rights Act R.S.C. 1985, c.H-6; Human Rights Act R.S.N.B. 1973, c.H-11; Individual's Rights Protection Act R.S.A. 1980, c.I-2, Alberta Bill of Rights, R.S.A. 1980, c.A-16; Human Rights Act, S.B.C. 1984, c.22; Human Rights Act, am. S.B.C. 1989, Bill 46; The Human Rights Code, S.M. 1987, c.H-175; The Human Rights Code, 1988, S.Nfld. 1988, c.62; Human Rights Act, R.S.N.S., 1980, c.H-24; Human Rights Code, 1981, S.O. 1981, c.53; Human Rights Act, S.P.E.I., 1975, c.72, Human Rights Act, am., S.P.E.I. 1989, c.3; Charter of Human Rights and Freedoms, R.S.Q., c.C-12; Charter of Human Rights and Freedoms, am., S.Q. 1989, c.51; Human Rights Act, R-55 1980; c.S-24.1; Human Rights Act, am.; S.S. 1989, c. Bill 73; Fair Practices Act, R.S.N.W.T., 1974, c.F-2; Human Rights Act, s.4 1987, c.3.

   The full text of these Acts, and the Regulations promulgated thereunder, are in Appendix B to this Report; accordingly, no individual citations are included in the text of the Report.

2. The United Nations Charter, 1945; The Universal Declaration of Human Rights, 10 December 1948; The International Covenant Economic, Social and Cultural Rights, 3 January 1976; The International Covenant on Civil and Political Rights, 23 March 1976; The Optional Protocol to the International Covenant on Civil and Political Rights, 23 March 1976. The United Nations and Human Rights, United Nations, N.Y. 1984, Sales No. E 84.I.6, pp. 244-61.

   The full text of these international legal instruments is set out in Appendix A to this Report; accordingly, no individual citations are included in the text of this Report.

3. The Constitution Act, 1982 is Schedule B of the Canada Act, 1982, (U.K.), c.11.

   The full text of this enactment is set out in Appendix A to this Report; accordingly, no further individual citations are included in the text of this Report.

4. Ethica Nicomachea, trans. W.D. Ross, Oxford University Press, c. 1925, Book V. 3, 1131a.

   Aristotle, himself, considered that justice establishes desert as the appropriate attribute to which his principle of equality should apply. Thus, persons equal in desert should be treated equally. However, it is highly contentious whether Aristotle was correct in this belief.

5. Being Amendments I to X, XIII to XV, XIX, XXIV and XXVI to the United States Constitution.

6. Plessy v. Ferguson, 163 U.S. 537 (1896).

7. 347 U.S.403 (1954).

8. P. B. Kurland, "The Supreme Court 1963 Term - Forward: 'Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government'" (1964), 78 Harv. L. Rev. 143, at p. 144. Cited in Tarnapolsky and Pentney, Discrimination and the Law, p. 16-4.

9. Dicey, Introduction to the Study of the Constitution 10th ed. by E.C.S. Wade, (London: Macmillan, 1961), pp. 202-3.

10. S.C. 1960, c.44. The full text of this enactment is set out in Appendix A; accordingly, no further individual citations are included in the text of this Report.

11. (1970) S.C.R. 282.

12. Ibid. at 297.

13. [!974] 38 D.L.R. (3d) 481.

14. [I979] 92 D.L.R. (3d) 417.

15. Justice W.A. Tarnapolsky & W. F. Pentney, Discrimination and the Law (Don Mills: Richard DeBoo Publishers, 1985) at I-25.

16. see fn. 2 supra.

17. E. Lindsay, "Linguistic Minority Educational Rights in Canada: An International and Comparative Perspective" Georgia Journal of Int'l and Comp. Law, Vol. 12: 515 at 526.

18. A. Lodhi & R., McNeilly Human Rights: Sources and Statutes (Fredericton: Human Rights Research and Development, 1987), p. 61-4.

19. Ibid., p. 65-8.

20. 23 U.N.T.S. 222.

21. Handbook of Existing Rules pertaining to Human Rights in the Inter-American System OEA/ser 4V/11.60 sep 1, 83, pp. 31-58.

22. See R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295.

23. Canadian Odeon Theatres v. Huck (1985), 39 Sask. R. 81 at 90.

24. [1984] 2 S.C.R. 145

25. Ibid. at 156, citing Minister of Home Affairs v. Fisher, [1980] A.C. 319 at 328.

26. [1985] 2 S.C.R. 150.

27. Ibid.

28. Marc Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry", (1982) 4 Supreme Court Law Review, pp. 131 at 140.

29. Michael M. v. Superior Court of Somona County 101 S.Ct. 1200. See also W.S. Tarnopolsky 'The Equality Rights in the Canadian Charter of Rights and Freedoms' 61 Canadian Bar Review, p. 242.

30. [1989] 1 S.C.R. 143.

31. Ibid. at 166.

32. [1979] 1 S.C.R. 183.

33. [1989] 1 S.C.R. 143 at 165.

34. Ibid. at 194.

35. Buck v. Bell 274 U.S. 200 (1927) at 208.

36. [1989] 1 S.C.R. 143 at 194.

37. Ibid. at 175.

38. Ibid. at 152.

39. see also Chapter 4(V)(C)(6) below.

40. see also Chapter 4(V)(C)(4) below.

41. see also Chapter 4(IV)(D) below.

42. see also Chapter 4(V)(B)(1) below.

43. see also Chapter 4(V)(B)(6) below.

44. [1986] 1 S.C.R. 103.

45. [1989] 1 S.C.R. 143.

46. Brossard v. Commission des Droits de la Personne du Québec, [1988] 2 S.C.R. 293, at 307.

47. Ibid. at 307.

48. [1989] 1 S.C.R. 143 at 176.

49. The following excerpt from the Factum of L.E.A.F. in its successful appeal of the Andrews case provides a comprehensive summary of the remedial approach adopted by the Supreme Court of Canada in the era of the Charter:

> The Context for Interpreting Section 15
>
> (i) Human Rights and Equality Values
>
> It is submitted that the interpretation of section 15 and the determination of its relationship to section 1 should be consistent with the decisions of this Court on the interpretation of the Charter, the meaning and significance of equality, and the importance to be accorded human rights and respect for human dignity.
>
> In particular, it is to be remembered that this Court has adopted a purposive approach to the interpretation of the Charter, looking to the value that the right or freedom seeks to protect and rejecting a narrow and technical interpretation.
>
> Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, at 366
>
> Hunter v. Southam, [1984] 2 S.C.R. 145, at 156-157

Singh et al. v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, at 209 218-19

R. v. Oakes, [1986] 1 S.C.R. 103, at 119

This Court has identified equality as one of the fundamental values of society, against which the objects of all legislation must be measured.

R. v. Oakes, supra, at 136

This Court has acknowledged the importance of promoting the equality of particular groups.

R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295, at 337-338

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, at 579

Caldwell v. Stuart, [1984] 2 S.C.R. 603, at 626

This Court has also decided that the interests of true equality may require differentiation in treatment.

R. v. Big M. Drug Mart Ltd., supra, at 347

It has, moreover, recognized that dominant groups in society should not be permitted to use the Charter to cut back legislative measures designed for the advancement of the less advantaged.

R. v. Edwards Books and Art Limited, [1986] 2 S.C.R. 713, at 779

This Court has acknowledged the importance of human rights legislation in a series of decisions which ruled that persons may not contract out of their rights under human rights legislation, and established the primacy of human rights legislation over other statutes. Human rights legislation has been characterized by this Court as quasi-constitutional.

O.H.R.C. et al. v. The Borough of Etobicoke, [1982] 1 S.C.R. 202

I.C.B.C. v. Heerspink et al., [1982] 2 S.C.R. 145, per Lamer J. at 157-158

The Winnipeg School Division No. 1 v. Craton et al., [1985] 2 S.C.R. 150

O.H.R.C. and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, at 546-547

This Court's respect for human rights legislation and equality principles reflects the trend in Canadian public policy and legislation over the past century toward increasing the substantive equality of those groups previously excluded from power and full participation in society. Anti-slavery legislation, extension of the franchise and the right to hold public office, reform of family law, and enactment of human rights legislation all reflect this growing commitment to egalitarian goals.

Walter S. Tarnopolsky & William Pentney, Discrimination and the Law: Including Equality Rights Under the Charter, (Toronto: DeBoo, 1985) at PART I, Background and Setting.

Mary Eberts, "The Rights of Women" in The Practice of Freedom, ed. Ronald St. J. MacDonald and John P. Humphrey (Toronto: Butterworths, 1979), 225, at 225-236

Lynn Smith, "A New Paradigm for Equality Rights" in Righting the Balance: Canada's New Equality Rights, ed. Lynn Smith (Saskatoon: The Canadian Human Rights Reporter Inc., 1986), 353, at 357

N. Colleen Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" in Charterwatch: Reflections on Equality, ed. Christine Boyle et al., (Toronto: Carswell, 1986), 195, at 198-200

In recent years, the range of prohibited grounds of discrimination in human rights legislation has been extended, from the original grounds of race, religion and ethnic origin, to include sex, marital status, family status, age, disability and in some jurisdictions, political belief, sexual orientation, and record of offences.

Walter S. Tarnopolsky & William Pentney, Discrimination and the Law, supra, at PART II, The Prohibited Grounds of Discrimination

Similarly, both the decisions of this Court and human rights legislation itself have expanded the concept of discrimination to include indirect and unintentional discrimination.

Simpson-Sears Ltd., supra, at 546-550

Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission and Huck, [1985] 3 W.W.R. 717 (C.A.), leave to appeal denied June 3, 1985: 60 N.R. 240 (S.C.C.)

Human Rights Code, 1981, S.O. 1981, c.53, as amended 1984, c.58, s.39; 1986, c.64, s.10

The Yukon Territory Human Rights Act, S.Y. 1987, c.3, s.11

The British Columbia Human Rights Act, S.B.C. 1984, c.22, s.13(1.1)

The Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c-12, s.10

This Court has recognized the need for effective remedies to redress conditions which prevent women from achieving equality in the workplace in two recent decisions under the Canadian Human Rights Act.

Action Travail des Femmes et al. v. CNR et al., June 25, 1987

Robichaud and CHRC v. The Queen, July 29, 1987

This Court has also recognized the importance of protecting the rights of disadvantaged persons in contexts outside both the Charter and human rights legislation.

E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388

It is thus submitted that the interpretation of section 15 should be informed by egalitarian principles and the necessity to protect the rights of historically disadvantaged persons, and by the strong recognition of the place of equality values and human rights legislation in the Canadian legal system. The concept of equality in section 15 should be no less broad.

50. Supra, note 8, at 2-1.

51. S.N.B. 1956, c.9.

52. S.N.B. 1959, c.6.

53. S.N.B. 1960-61, c. 7.

54. Supra, note 15 at 2-6.

55. S.N.B. 1967, c.13. The N.B. Code's historical development is set out in Appendix C.

56. Supra, note 15 at 2-8.

57. Synoptic Reports of the Legislative Assembly of New Brunswick, 1967, volume 1, p. 3.

58. Ibid.

59. Ibid.

60. Ibid. at 24.

61. S.N.B. 1967, c.13. The full text of all New Brunswick human right legislation is set out in Appendix C; accordingly no specific citation are made with respect to the Act or its legislative antecedents.

62. [1985], 1 S.C.R. 177 at 224.

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CHAPTER TWO

INCORPORATING EQUALITY OF OPPORTUNITY IN A NEW BRUNSWICK CHARTER OF RIGHTS AND FREEDOMS

I. Introduction

The historical and legal background to this work demonstrates clearly that the New Brunswick government has legal obligations under the U.N. International Bill of Rights and the Canadian Charter of Rights and Freedoms to promote equality by law and administration. The legislative development of the New Brunswick Human Rights Code is indicative of the sincere, but incomplete, fashion in which the Province has endeavoured to meet these obligations.

The full realization of the principle of equality of opportunity would attain a greater measure of realization through a comprehensive human rights enactment - a New Brunswick Charter of Rights and Freedoms. This New Brunswick Charter would consolidate the fundamental, democratic, legal, economic, cultural, social and anti-discrimination rights and responsibilities. In so doing, it would confirm and raise to near constitutional proportions the existing human rights obligations of provincial central governmental authorities. Moreover, it would confirm and extend the application of the fundamental, legal and democratic rights contained in the Canadian Charter of Rights and Freedoms. Finally, it would confirm and revitalize the compliance and promotional functions of the New Brunswick Human Rights Commission.

While these aspirations are broad in scope, they do not contain any substantively novel ideals. Rather, they are the next logical step on a legislative walk that has included the International Bill of Rights, the Province's Program of Equal Opportunity, the New Brunswick Human Rights Code and the Canadian Charter. The proposed model now exists in the Quebec Charter of Human Rights and Freedoms and various provisions of other provincial human rights statutes.

This Chapter does not attempt to justify the inclusion of each provision of a New Brunswick Charter. To do so would be presumptuous, particularly within the time and budgetary constraints of this inquiry. However, it does endeavour to ground recommendations in the firm philosophical base of equality of opportunity. Further, it examines the types of fundamental, democratic, legal, economic, social, cultural and environmental rights that ought to be considered for inclusion in the

Charter. These include the right to education, the rights to be heard by an independent judicial decision-maker, the right to legal counsel and the right to a clean environment.

II. The Foundation of Fundamental Human Rights: Justice and Equality of Opportunity

Central to the question of equality is the profoundly controversial question of establishing the proper respects or dimensions in which people should be treated equally. Much of the confusion arising from the debate about equality originates in the various and disparate conceptions of equality being advanced. While almost everyone agrees that the concept of equality is of value, there is considerably less agreement on the particular conception of equality which is most valuable and, therefore, most in keeping with contemporary tenets of justice.

The disputants in this controversy may be usefully, (if not simplistically), divided into two broad camps: those who value liberty or freedom, more than equality, and those who value equality more than liberty. The former camp may be labelled libertarian and the latter, egalitarian.

Libertarians prize liberty, or freedom, in the sense that the individual should be as reasonably free as possible from government interference to make the most of his or her abilities.[1] These abilities can then be exercised through similarly free and open social institutions, in particular the free market, through which deserving participants can accumulate wealth which, in turn, they can deal with as they choose. Limited taxation for the purposes of re-distribution, (or equalization), to those who are less successful in the market-place, limited regulation of the market, and limited adjustments to the notion of freedom of contract are consistent with the view of proponents of libertarianism.

The preeminence in which this camp holds the idea of liberty, and the way in which it is held, lead to a conflict with broader notions of equality which require re-distribution of resources usually through taxation, to, for example, the needy. Therefore, the type of equality with which conservatives are most comfortable is procedural equality, sometimes called equality before the law.

In 1960, the Canadian government enacted The Canadian Bill of Rights,[2] the forerunner to the Canadian Charter of Rights and Freedoms.[3] Section 1(b) of the Bill of Rights recognizes and declares the right of the individual to "equality before the law". This phrase was interpreted by the Supreme Court of Canada in a number of cases, perhaps most clearly in Attorney General of Canada v. Lavell.[4]

In the course of deciding the Lavell case, the Court defined equality before the law to mean:

> ... equality in the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land.[5]

This decision gave a very limited meaning to the words of section 1(b) by restricting them to indicate merely that every individual is answerable to the law, in the sense that no one is above the law.[6] In adopting this interpretation, the Court was simply re-affirming the second proposition of the three part principle known as "the rule of law" as first expounded by Professor A.V. Dicey[7] in 1885. By infusing the Bill of Rights with an aging Diceyan conception of equality before the law, the Supreme Court embraced a conception which was procedural, and not substantive, in nature. For, while every individual was answerable to the law as it stood and as it applied to her or him, there was no way to challenge the content or substance of the law; the law was not answerable to the individual.

This nineteenth century conception of equality was particularly attractive to those who held the quintessentially libertarian position for it impinged not at all on the broad scope of negative freedom, particularly economic freedom. Equality before the law, in the sense in which it was understood by Dicey as part of the rule of law and later by the Supreme Court in the Bill of Rights, was highly but selectively individualistic in that it assisted in sustaining a political and legal environment in which certain "strong" and competitively able individuals could flourish. It was for this reason that the conception of equality before the law as interpreted in the Bill of Rights came under sustained attack,[8] especially by those identifying with the more egalitarian positions.

Egalitarians maintained that the Diceyan conception of equality before the law preserved the privileges and powers of class. For them, justice and equality required that all persons at least have the chance, if not the assurance, of securing to themselves the benefits of social life which are so important in enabling every individual to pursue the life each has chosen for his or herself. Starting with the assumption that every person is equal to every other person, egalitarians asked why governments should endorse a conception of equality which favours the strong or the fortunate. Why, they asked, should the law be written to the advantage of the able-bodied, the intelligent, the 'deserving' or meritorious, or the fortuitous when these attributes are the accidents of birth, the result of subjective evaluations or the product of luck? If equality is to be taken seriously, why were the voices of morally equal but disabled, needy, or hapless persons not heard? Why was government not treating each of its citizens with equal concern and respect?[9]

These sentiments galvanized liberals into advancing what they considered to be better, more just conceptions of equality. The most egalitarian of these conceptions is known as equality of result.[10]

The proponents of equality of result are concerned to ensure that all people have equal endowments of the significant social benefits such as education, health care, employment and housing. They reason that if all people are equal in dignity and worth they should all be assured of a dignified and worthwhile lifestyle through the provision of resources necessary to such a lifestyle. Laws which create classification in such a way as to militate against this objective are, therefore, unjustifiable. Only laws which pursue this goal, are thought to be justifiable.

Equality of results has it opponents too. Implicit in this conception of equality is the virtue of sharing. It is only when those with resources transfer some of those resources to those in need of them that full equality of results can be achieved. But the libertarian will ask: Why should the deserving give up the fruits of hers or his hard-work, diligence or initiative to the less able, and less meritorious? Why should the productive yield to the unproductive? Why should those with wisdom and foresight forego the fullness of their futures in order to pay for the improvident choices through which the disciples of folly have squandered their opportunities? Besides, it will be argued, even if equality of result is achieved, it will be lost in the instant any person gives up a share of his or her resources for a service provided by another person who, in turn, requires nothing from the person paying for the service. Then, an artificial redistribution of resources will be needed again, and again and again.[11]

From the foregoing discussion of these divergent libertarian and egalitarian positions, it can be seen that the debate about the proper role of equality has been a debate about where best the balance between liberty and equality should be struck. It is, essentially, a debate about how much liberty and how much equality should exist. It is a debate about what is the best conception of justice by which a society should conduct itself; a debate which necessarily goes beyond simply the values of liberty and equality to implicate other important values in the broader notion of justice such as community, efficiency, democracy, order and rationality.

It is asserted that fundamental human rights can best be founded on a conception of justice which recognizes the existence of a nexus or group of closely held societal values which, at times, complement one another and which, at times, conflict with one another. A consensus of justice must be arrived at which takes account of the nature of personhood and the proper interests or claims which arise therefrom within the context of the traditions of the New Brunswick community. Human rights as justice must also attempt to end the liberty/equality conflict and see how these apparently counter-poised values can be harmonized within the practical reality of a world of increasing shortages. Finally, acceptable justice must embrace a sound and useful conception of equality and the implications of that conception must be understood.

An observation of the nature of human beings suggests that people are by nature and as a result of social living both concerned with the well-being of themselves and the well-being of their neighbours. Being primarily interested in one's self is a justifiable attribute of human beings to a point. Everyone is entitled to assure for themselves that they have the necessities of life and the ability to make valuable choices about the types of lives they may aspire to lead. Further, each person who is capable of doing so, has a responsibility to her - or himself to meet these needs and aspirations to the extent that is practicably possible. This practical responsibility to oneself arises from the acknowledgment that the fulfillment of these needs and aspirations is dependant upon the resources and opportunities which others, through their co-operative efforts, make possible. In a community of limited resources and opportunities, it is unjustifiable that any person who is capable of providing for her or his self does not attempt to do so to the best of her or his abilities.

The observation that resources and opportunities are largely the result of communal living is significant to that other dimension of personhood - the one which recognizes a duty to help others - once his or her justifiable needs and aspirations are met. Of course, many people accept this duty as a personal moral imperative but, for those who do not, the legal imposition of such a duty is readily justified. For, without the contributions and enrichments which all honest persons make to society, the resources and opportunities which have enured chiefly to the benefit of the more fortunate would not exist. Hence, a duty is owed; the more fortunate have an obligation to assist those less fortunate persons who, in turn, have an obligation to assist themselves so that as much as is possible is available for the even less fortunate, a group which adventition alone will ensure always exists.

Paramount to these social responsibilities arising from communal life, is the need for the development and distribution of resources and opportunities. But this development and distribution need not bring the values of equality and liberty into conflict. In fact liberty, or freedom, properly understood within the context of community life, nurtures and enhances equality.

This is the side of freedom which the libertarian does not explore; a side which forces a recognition of one's responsibility to others. Whereas the fortunate may only require freedom in its negative sense to assure them the valuable choices of life, the less fortunate require freedom in a different, more positive sense. They require the provision of resources in order to meet their responsibility to self; in order to make the meaningful choices of life. And, as has been shown, it is the duty of the more fortunate to ensure the provision of these resources.

How far does this duty of provision by the fortunate extend, and to what extent can this right to resources of the less fortunate be enforced? The answer to this question depends upon the vitality and strength of the community. In a land of milk and honey, the primary responsibility - the responsibility to one's self - can be achieved for every individual because the fortunate will have developed sufficient resources to meet the needs of the less fortunate. In a community of lesser endowment, it is only possible to meet some of the needs of the less fortunate. This is so, simply because there is less to go around, less with which the fortunate can be encouraged to fulfill their duties to the less fortunate. In such a community, an attempt to impose too onerous a duty of provision may, in the result, make the enforcement of their right to resources by the less fortunate, a more remote possibility. For, if too much is taken from the fortunate for distribution to the less fortunate, the fortunate may consider that the incentive to create resources and opportunities is gone. So, in response to the question: how far does the duty of provision by the fortunate extend in any particular community, the answer will be "to the point where a more vigorous enforcement of the duty would harm the less fortunate".[12] It will be at this point that the values of liberty and equality are harmonized to the maximum degree possible within the community. This is because it will be at this point that the fortunate and the unfortunate have the greatest possible equality in the liberty necessary to choose and pursue their individual lifestyles.

What conception of equality is most consistent with the foregoing account of human nature and responsibility in a community of limited resources? As has been seen, the object of liberty and equality is to achieve real choice for all individuals in their divergent lifestyle aspirations. Accordingly, the most meaningful and just ideal of equality is "equality of opportunity". This may be defined as follows: "Every individual should be equally free to choose and pursue his or her own lifestyle to the extent that is practically possible". Equality of opportunity recognizes that, for some, meaningful choices can be made independently and that, for others, the ability to make meaningful life choices will require the provision of resources. Equality of opportunity is the mainstay of the broader conception of justice upon which all fundamental human rights are founded, and provides a basis from which a variety of fundamental human rights spring, in manifold directions.

This idea of equality is not a novel one. On the contrary, it is the philosophical underpinning of the International Bill of Rights, the Canadian Charter of Rights and Freedoms and the New Brunswick human rights legislative regime.

In an article published by one of the principal architects of the Canadian Charter of Rights and Freedoms, Dr. (now Mr. Justice) Mark MacGuigan concluded that:

> Law is an ordination of reason for the common good. Two goods comprise the common good: external material goods and transcendental spiritual goods. Because of the greater nobility of spiritual goods, freedom of choice of an individual must be subjected to much less restriction in relation to spiritual, rather than material, goods. Consequently, when a conflict arises between a material and a spiritual freedom, the former must yield totally. However, there is also nothing sacrosanct about freedom of choice and there must be sufficient interference by the state with it to make possible the greatest practicable expansion of freedom of attainment in society. The twin of freedom of attainment in society is equality of opportunity. Human beings must be made equal in their opportunities to be themselves. The principal purpose of the state in the attainment of this ideal is to offer more through law to those who start with less.[13]

It is important to note that the Charter's architects had hoped that complementary instruments would be enacted by the provinces; however, this initiative was discontinued in the face of provincial opposition to constitutional entrenchment.[14]

Within New Brunswick, this equality of opportunity has been the philosophical underpinning of the provincial administration for over two decades.

On April 1st 1966, the then Premier of New Brunswick, the Honourable Louis J. Robichaud, rose in the House to provide details of the Program of Equal Opportunity that had been announced in the Throne Speech at the outset of the 1966 Legislative Sitting.

> Now the time has come to build the structure of reform for New Brunswick, for we believe that this program is essential, and is essential now if the people of our province are to benefit within a reasonable period of time.
>
> Back in 1964, the Vice-President of the United States, Hubert H. Humphrey, made an important statement. He said:
>
>> 'We have learned that if we are going to have a government that offers a future to each generation, you have to keep open the doors of opportunity. There isn't any opportunity for the illiterate, and there isn't any opportunity for the uneducated. People who are uneducated nowadays are prisoners.

> So, education in a free society, where you have opportunity to make choices, is the secret of power, of freedom, of the good life.'
>
> This is the philosophy of equal opportunity, of giving to every citizen the opportunity to cast off the chains of poverty by developing to the utmost his talents, abilities and skills.
>
> We of the government of New Brunswick have accepted that principle. We intend to build that acceptance into law for the sake of genuine opportunity for all our people.
>
> Our program does not subordinate initiative, ... Our program will open the door for the initiative and imagination that are natural instincts of every ... person in our province.[15]

It was this concept of equality of opportunity that fueled the outpouring of economic, social and cultural legislation of the Program of Equal Opportunity. The same idea was the impetus for the array of human rights legislation enacted under the complementary Program for Citizen and Community - legislation that led to establishment of the Department of Justice, the Human Rights Commission, the Ombudsman's Office and the Office of the Official Translator.

The restructured governmental system and the legislative framework that established the Program of Equal Opportunity remains intact to the present day. Moreover, the delicate balancing of freedom and equality rights and responsibilities remains a valid objective as New Brunswick enters the 1990's.

The legislative sense of purpose and devotion to legislative antecedents may properly be the subject of enshrinement in a comprehensive human rights code and a governmental administrative structure that furthers the recognition and promotion of human rights inherent in the concept of equality of opportunity.

III. A Proposed New Brunswick Charter of Rights and Freedoms: Legislative Antecedents

A) The Quebec Charter of Human Rights and Freedoms

From the outset of this inquiry, one has been perplexed by the limited substantive scope of the New Brunswick Human Rights Code, particularly in light of its international legal antecedents, the judicially inspired remedial impact of the Charter and the ambitious phraseology of the preamble and objects clauses of the New Brunswick Code. On the other hand, one has been intrigued by the manner in which the Quebec Charter of Human Rights and Freedoms has endeavoured, in the words of its preamble "to solemnly declare the fundamental human rights and freedoms ... so that they may be guaranteed by the collective will and better protected against any violation".

The admiration for the Quebec model is one that is shared by senior public officials of the authorities that have initiated this work and others with whom such a proposal has been discussed. For example, Mr. Maurice Bourque, the President of l'Association des Juristes d'expression française du Nouveau-Brunswick has suggested that "la charte québecoise elle-même dont pourrait s'inspirer le législateur nouveau-brunswickois dans son travail de révision et de renforcement de notre loi".[16]

An examination of the Quebec Charter indicates that it is inspired by the U.N. International Bill of Rights as well as the European Convention, (itself a U.N. Regional Human Rights enactment), both of which are an impetus to human rights legislation in other Canadian jurisdictions.

Mr. Jacques Chamberland, the Deputy Minister of Justice for the Province of Quebec, has summarized the reach of the Quebec Charter thus:

> [TRANSLATION] The Québec Charter was not intended solely to fight against discriminatory practices, even though discrimination, as we shall see, occupies an important place therein. The Charter protects fundamental rights and freedoms such as freedom of conscience, religion, opinion, expression, and association, the right to life, inviolability and freedom, and respect for an individual's private life (ss. 1 to 9.1 of the Charter). However, it also guarantees broad protection of political (ss. 23 to 28) and economic and social rights (ss. 39 to 48). Among the economic and social rights are notably the right to free public education, to measures of financial assistance and to social measures susceptible of ensuring an individual an acceptable standard of living. Thinking along the lines of this conference we can contemplate the right of every person who works to fair and reasonable conditions of employment that have proper regard for his health, safety, and physical well-being. We can also note the right of every aged person and every handicapped person to protection against any form of exploitation.[17]

The Quebec Charter is, in short, a comprehensive enshrinement of fundamental freedoms and democratic, legal, economic, cultural and social and anti-discrimination rights.

There are two additional features of the Quebec Charter that are noteworthy. Chapter 4 of the Charter extends quasi-constitutional protection to the provision of free public education and the protection of children, cultural minorities, the financially disadvantaged, workers, the family, the aged and the disabled. With the exception of the rights extended to children, the family, the aged and the disabled, the right is limited according to the "standard" or "extent provided by law". That is, while the Quebec Charter raises the importance ascribed to such rights, it does so in a manner that complements the existing provincial legislative framework.

The Quebec Charter also provides that, while the Quebec Human Rights Commission has an educational and promotional function that extends to all its "principles" "objects" and "provisions", its substantive powers are limited to the enforcement of the Charter's anti-discrimination provisions.

These types of limits suggest that a comprehensive New Brunswick Charter could be enacted without any significant dislocation of the provincial public administration.

B) Other Provincial Enactments

Although the Quebec Charter is the most comprehensive Canadian human rights enactment, Quebec is not alone among those provinces that have seen fit to include a broad range of human rights protection in a provincial legislative scheme.

Saskatchewan and the Yukon have included a bill of rights in their respective human rights codes. The Province of Alberta has also enacted a Bill of Rights although it is contained in a separate act.

As set out in Table 2A, these enactments guarantee fundamental freedoms in addition to diverse democratic, legal, economic, cultural, and social rights.

Table 2A - Rights Protected in Provincial Bill of Rights Provisions

Liberty	Alta., s.1(a); Que., s.1.
Security of the person	Alta., s.1(a); Que., s.1; Sask, s.7.
Property rights	Alta., s.1(a); Que., s.6-8; Yukon, s.5.1.
Religion	Alta., s.1(c); Que., s.3; Sask., s.4; Yukon, s.4.

Speech	Alta., s.1(d); Que., s.3; Sask., s.5; Yukon, s.4; (plus 9 jurisdictions, as an exception to the prohibition against discriminatory publications).
Assembly	Alta., s.1(e); Que., s.3; Sask., s.6; Yukon, s.5.
Association	Alta., s.1(e); Que., s.3; Sask., s.6; Yukon, s.5.
Press	Alta., s.1(f); Que., s.3 (opinion); Sask., s.4 (opinion); Sask., s.5; Yukon, s.3, 4.
Opinion	Que., s.3; Yukon, s.3.
Freedom from arbitrary arrest; right to judicial determination of detention	Que., s.23-38; Sask., s.7.
Democratic rights	Que., s.21, 22; Sask., s.8.

Section 8 of the Saskatchewan Code confers democratic rights on "every qualified voter resident", including voting rights and the right to "require that no Legislative Assembly shall continue for a period in excess of five years." Moreover, sections 9, 13 and 17 of the Code confer a right to work, to an education and to occupational membership without discrimination ..."

The Saskatchewan Commission's experience has been that the 'bill of rights' protections enable it to deal with matters in the public and private sector that would otherwise only be amenable to Charter relief in the public sector (e.g., arbitrary arrest and detention by private security guards and interference with free speech rights by a municipality). Further, the complaints procedure under the Code provides a more accessible remedy then obtains under section 24 of the Charter.

The Legal Counsel to the Saskatchewan Human Rights Commission, Mr. Milton Woodward, has concluded that the Bill of Rights protections have advanced private rights not protected by the Charter and also provided a good statutory balance between positive and negative rights.[18]

Section 5.1 of the Yukon Code provides for "a right to the peaceful enjoyment and free disposition of ... property." This Code also provides a "multicultural heritage" clause similar to section 27 of the Charter, namely, that "this Act shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of the residents of the Yukon."

The Executive Director of the Yukon Human Rights Commission, Mr. David Porter, stated that the decision to include a bill of rights, private property rights protection and a multicultural interpretive clause was based on a desire to have a human rights code with strong educational and promotional value. It also maintained "an eye to the future" in that the bill of rights was of sufficient scope to develop as the safeguard of a broad range of human rights and freedoms.[19]

The Alberta Bill of Rights declares and establishes procedural safeguards with respect to the right of the individual to "liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law". Inspired, as its preamble suggests, by the Canadian Bill of Rights, the Alberta instrument establishes the right of the individual to "equality before the law and the protection of the law." Finally, it recognizes the freedoms of religion, speech, assembly, association and the press.

Apart from these explicit "bill of rights" provisions, mention should be made of the rather oblique "free speech" guarantee established in eight provincial enactments with respect to discriminatory publications. Section 6(2) of the New Brunswick Human Rights Code is typical of these provisions, stating that "nothing in this section interferes with, restricts or prohibits the free expression of opinions upon any subject by speech or in writing." (See also B.C., s. 2(2); Nfld., s. 15(2); N.S., s. 12(2); Ont., s. 12(2); P.E.I., s. 12(2); Sask., s. 14(2); N.W.T., s. 5(2)).

Finally, it is noted that section 3 of the Nova Scotia Code, sections 1 to 7 of the Ontario Code, and the Saskatchewan provisions listed in Table 2A expressly create a "right" not to be discriminated against in the traditional fields of activity covered by all Canadian human rights legislation. This terminology appears to have the same meaning and effect as the prohibitory language used in other Canadian enactments.

This brief survey indicates that other Canadian jurisdictions have endeavoured, in varying degrees, to incorporate into human rights legislation the kinds of rights regarded as fundamental by the U.N. International Bill of Rights. The New Brunswick Charter should be extended to include the protection of fundamental rights, democratic, legal and economic, social and cultural rights in addition to retaining provisions that guarantee freedom from discrimination.

C) The Present New Brunswick Context

It is recommended that the New Brunswick Government enact a comprehensive human rights Charter, and that this could be done without requiring a substantial dislocation of the present legislative regime.

New Brunswick has traditionally taken a leading role in the advancement of human rights, and its repository of laws reflects this commendable record. In addition to the existing anti-discrimination and free speech protections in the New Brunswick Human Rights Code, a number of other legislative initiatives have been undertaken to incorporate the fundamental rights and freedoms of the U.N. International Bill of Rights into the Province's domestic law. Such initiatives include the Family Services Act[20], the preamble of which recognizes that:

- the family exists as the basic unit of society, and its well-being is inseparable from the common well-being;
- children have basic rights and fundamental freedoms no less than those of adults;
- there is a right to special safeguards and assistance in the preservation of those rights and freedoms and in the application of the principles stated in the Canadian Bill of Rights and elsewhere;
- basic rights and fundamental freedoms of children and their families include a right to the least invasion of privacy;
- parents have responsibility for the care and supervision of their children;
- elderly, disabled and dependent persons are entitled to protection;
- social services are essential to prevent or alleviate the social and related economic problems of individuals and families;
- the rights of children, families and individuals must be guaranteed by the rule of law...

Similar declarations of principle may be found in the Victims Services Act[21] and the Official Linguistic Communities Equality Act (Bill 88).[22]

In addition, the Province of New Brunswick has recently commenced legislative initiatives to incorporate the international economic objectives of the United Nations into our provincial statutes. These initiatives - in particular, the International Sale of Goods Act[23] - are seen as providing New Brunswick with an opportunity to realize the full potential of its bilingual and multicultural business community in a manner that will promote equality and mutual benefit of all humankind.

Legislative discipline alone invites the incorporation of such principles into a single comprehensive human rights Charter. Such a step becomes a compelling one in light of the New Brunswick Government's legal and moral obligations pursuant to international law.

D) The Canadian Charter of Rights and Freedoms

The majority of provisions alluded to above were enacted prior to the adoption of a written constitution by Canada, more particularly, the Canadian Charter of Rights and Freedoms ("the Canadian Charter"). The Canadian Charter establishes fundamental rights, democratic rights, legal rights and limited economic, cultural and social rights. Moreover, it is expressly declared to be the "supreme law of Canada" rendering "of no force or effect" any law that is inconsistent with its provisions. By section 32, the Charter applies to any "matter within the authority" of the Federal Parliament and the legislature of each province and territory. Under section 26, the establishment of the Canadian Charter "shall not be construed as denying the existence of any other rights or freedoms that exist in Canada".

In Retail, Wholesale and Department Stores Union, Local 580 v. Dolphin Delivery Limited[24], the Supreme Court of Canada ruled that the Canadian Charter does not apply to private litigation between private parties where no exercise of or reliance upon government actions is involved. The Court pointed out that the word "government" in section 32 refers to both the executive and administrative branches of government. The Canadian Charter applies to the legislative, executive and administrative branches of government whether or not their action is invoked in public or private litigation. The Canadian Charter will apply to the common law only insofar as it is the basis of some governmental action that infringes on guaranteed rights or freedoms. It is noted that the search for a guiding principle of the Charter's application continues, and it appears that the "government control" and "government functions" tests will extend the application of the Canadian Charter. Conversely, significant areas of civil rights activities will remain beyond the reach of the Canadian Charter and might well be appropriate for inclusion within the scope of a more comprehensive provincial code. It is suggested that any concerns arising out of the potential overlap or conflict between a New Brunswick Charter and the Canadian Charter could be met by the incorporation of a provision such as that found in section 26 of the Canadian Charter:

> 26. The guarantee of this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

As the Supreme Court of Canada concluded in the Singh[25] case, such a provision enables all other applicable constitutional and quasi-constitutional instruments to retain their force and effect. The Court pointed out that because each enactment is drafted differently:

> they are susceptible of producing cumulative effects for the better protection of rights and freedoms.[26]

Such a provision would have particular application to fundamental, democratic and legal rights.

With respect to economic, cultural and social rights, it is noted that these pertain to matters within provincial legislative competence. For example, chapter 4 of the Quebec Charter extends quasi-constitutional protection to the provision of free public education and the protection of children, cultural minorities, the financially disadvantaged, workers, the family, the aged and the disabled.

E) Conclusion

It is concluded that it is fitting that New Brunswick's human rights legislation should find expression in a document that reflects its comprehensive international and domestic human rights obligations. It is clear that the New Brunswick Human Rights Commission's present obligations to promote such rights would be greatly clarified by such a legislative exercise. The recommended format is a New Brunswick Charter of Rights and Freedoms incorporating fundamental, democratic, legal, economic, social, cultural and anti-discrimination, rights and obligations.

RECOMMENDATIONS:

2.1 It is recommended that the Government of New Brunswick enact a comprehensive human rights statute, the New Brunswick Charter of Rights and Freedoms ("the New Brunswick Charter"). This enactment would declare and protect fundamental rights, democratic rights, legal or judicial rights, and economic, social and cultural rights in addition to the right to equal treatment

and equal protection from discrimination as obtained by the existing New Brunswick Human Rights Code.

2.2 It is recommended that the United Nations International Bill of Rights, the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms serve as the models for the New Brunswick Charter.

IV. The Contents of the New Brunswick Charter of Rights and Freedoms

A) Introduction

In recommending that the New Brunswick Government enact a near constitutional Charter, one looks to the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms as appropriate legislative models.

The proposed model would incorporate a) fundamental; b) democratic; c) legal; d) economic, cultural and social, and e) anti-discrimination rights, freedoms and responsibilities.

The following discussion is not intended to be an exhaustive examination of these Charter components. Rather, it underlines certain characteristics which ought to receive special consideration in such a formulation.

B) Fundamental Rights

A variety of Canadian models exists with respect to the conferral of fundamental rights. These are set out in Table 2A above, in Section 2 of the Canadian Charter and in sections 1 to 9 of the Quebec Charter. The Quebec Charter recognizes that the most fundamental right is "to life, personal security, inviolability and freedom" and cloaks each individual with a "judicial personality". This conferral of primacy on the sanctity of human life is worthy of emulation in the New Brunswick Charter.

It is suggested that this part of the New Brunswick Charter should also underscore the responsibilities that necessarily enure to those who enjoy such fundamental rights and freedoms. The need for legislative attention to 'human responsibilities' is addressed succinctly in the following submission made by Mr. Tom Crowther, the President and Publisher of the Fredericton Daily Gleaner:

> The greatest failing in the current situation regarding human rights, is the failure to give equal weight and emphasis to human responsibilities. Rights must be balanced with the responsibility to protect the rights of others.
>
> It would appear that the singular emphasis on rights, pursued with vigour through the past 15 or 20 years, has created a society in which the objective is to secure rights without any regard for anyone else. In this sense, people have become islands, and there has been a loss of community feeling. It is only at the time of a major disaster that the hearts and minds of people reach out to others. Regretfully, most of the time we are pursuing our own peculiar rights and pay scant attention to the rights of others.[27]

The incorporation of such a 'responsibility' has been completed by the Province of Quebec, in part, though the creation of the following 'right to assistance'.

> 2. Every human being whose life is in peril, has a right to assistance.
>
> Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

While this provision is specific in its terminology, it reflects a philosophy intent on the necessity of balancing rights and responsibilities, a balance which is the true realization of fundamental rights and freedoms.

RECOMMENDATION:

2.3 It is recommended that the New Brunswick Charter incorporate fundamental human rights and the responsibility to respect and promote fundamental rights and freedoms.

C) Democratic Rights

Sections 3 to 5 of the Canadian Charter establish the fundamental democratic rights of all New Brunswickers. Their inclusion in a New Brunswick Charter might usefully serve to remind the electors of this sacred right and privilege, possibly extending it to other types of electoral rights, e.g., those pertaining to municipal and educational institutions. Furthermore, it is recommended that the New Brunswick Charter incorporate "a right to petition to [the Legislature] for the redress of grievances", as presently obtains in section 21 of the Quebec Charter. Such a provision would confer the specific right to petition the Legislature through the Office of the Ombudsman. This mechanism is presently a feature of several European and Commonwealth constitutional enactments.[28] A right to petition would reinforce the present common law right of the citizen to petition the Legislature directly for redress of grievances arising from government action.

RECOMMENDATION:

2.4 It is recommended that the New Brunswick Charter incorporate democratic rights within its provisions, including a right to petition the Legislature directly or through the Office of the Ombudsman.

D) Legal Rights

1) Generally

This Chapter has already examined the reach of judicial rights protection in the Quebec, Saskatchewan and Yukon provincial human rights enactments as well as the Alberta Bill of Rights. These complement the rights established in sections 7 to 14 of the Canadian Charter.

In any decision to incorporate these protections in a New Brunswick Charter, one may look for guidance from the Supreme Court of Canada decision in Reference Re Section 94(2) of the Motor Vehicle Act, wherein Mr. Justice Lamer provided an analysis of sections 7 to 14.[29] He stated that section 7 protects the life, liberty and security of the person. "The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person".[30] Therefore, the applicant must first demonstrate that there has been an interference with the right to life, liberty or security, and then it must be determined if the deprivation was in accordance with the principles of fundamental justice.

Mr. Justice Lamer also stated that sections 7 to 14 of the Charter are illustrative of deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice. He stated that section 7 to 14:

> ... could have been fused into one section, with inserted between the words of section 7 and the rest of those sections the oft utilised provision in our statutes,

> 'and, without limiting the generality of the foregoing (section 7) the following shall be deemed to be in violation of a person's rights under this section'.[31]

Two rights, specifically enunciated in the U.N. International Bill of Rights and the Quebec Charter, are so favoritismintegrally tied to the protection of human rights as to merit separate discussion.

2) Independent Judicial Decision-Makers

The Chief Justice of Canada, the Rt. Hon. Brian Dickson, speaking to the Canadian Bar Association in August 1984, said: "The public is entitled, in my opinion, to be reassured that our judges are appointed on the basis of merit and legal excellence alone."[32]

The New Brunswick Government is responsible for the appointment of some 25 Provincial Court judges and numerous tribunal, commission and inquiry appointees. The Provincial Courts try the overwhelming majority of criminal cases in the province, while the tribunals, commissions and inquiries make important decisions on the rights of citizens concerning a host of matters such as labour and employment relations, property uses and human rights. These various jurisdictions over the rights of individuals mean that the Provincial Court and many of the tribunals, commissions and inquiries, make decisions of a judicial nature. The complexity and gravity of these decisions requires that only the best qualified candidates should be appointed to make decisions of a judicial nature. Inherent in the right to a "fair hearing" is the requirement that the judicial decision-maker be of the best possible quality. In the context of criminal and penal matters, in particular, this requirement is reflected in subsection 11(d) of the Canadian Charter of Rights and Freedoms which says:

> Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial hearing.

This is complementary to the more explicit provision found in section 23 of the Quebec Charter:

> Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.

These provisions are a derivative of rights enunciated in section 10 of the Universal Declaration and section 14(1) of the International Covenant in Civil and Political Rights.

Much of the recent governmental activity with respect to judicial appointments has been a response to criticisms made of the judicial appointments process by a Canadian Bar Association Committee on the Appointment of Judges chaired by Mr. E. Neil McKelvey, Q.C. Coincidental to the Committee's conclusion that "political favouritism has been a dominant, though not a sole consideration, in court appointments"[33], the Province of New Brunswick has established an advisory committee to recommend Provincial Court appointments to the Government.

It is concluded that the incorporation of a provision analogous to section 23 of the Quebec Charter, and applicable to both curial and tribunal appointments, would underscore the declared need for the highest quality of judicial decision-maker. The conferral of such a right should also declare that an objectively determined merit system ought to be determinative of the selection of curial and tribunal members.

3) The Right to Counsel

Courts operate to fairly resolve disputes between parties based on their respective legal rights. In some cases, the dispute is between private individuals, including corporations; in others, it is between the individual and government. Paradoxically, a forum which is designed to assure justice can be used to obstruct justice. This is because access to the courts is often a function of the resources potential disputants have at their disposal. In particular, some disputants can afford legal counsel and some cannot. In a contest between private disputants, this means that indigent complainants and defendants may never have their legal rights vindicated. In consequence, the indigent complainant may not be able to pursue a legal action while an indigent defendant may not be able to fend one off. In the context of a dispute between an individual and government, the consequences can often be more grave. Here, the nature of actions taken by government against individuals frequently result in the imposition of severe burdens, such as a prison sentence or fine, the taking of assets or the apprehension of children.

An inability to gain access to the courts for the enforcement of one's rights is a major impediment to justice and to the notion of equality of opportunity. This is because rights are often the mechanism by which one protects one's interests. If the individual cannot protect legitimate interests then the opportunities attendant on these interests are foreclosed. For example, if a victim in a motor vehicle accident cannot recover damages from the insurance company representing a negligent driver, the opportunity for a damage award and the benefits it will bring are foregone. If a defendant in a criminal case cannot defend a charge or cannot appeal a doubtful conviction, the opportunity of personal freedom may be diminished. If a mother cannot defend against a custody action mounted by government then the opportunity to raise her family may be jeopardized. If a beleaguered woman cannot afford to divorce an abusive husband, then the opportunity to escape an intolerable situation may be lessened.

Access to the courts is one of the most significant and effective equalizing measures available. The courts potentially provide one of the few forums in which the weak may enforce their rights against the strong, by enlisting the support of the state through a successful legal action. It is one thing to have legal rights, it is quite another to be able to enforce those rights.

The provision of legal counsel by the government to persons in need would greatly enhance the ability of the needy to enforce their rights. The benefits flowing to the needy from successful court actions would lead to greater social equality. Even those who support the minimum conception of equality - equality before the law - would endorse a right to the provision of legal counsel.

As described earlier in this report, equality before the law means that no one, including government,[34] is above the law. The law oversees all legal relationships and all are accountable to the law. There must be access to the courts through which this accountability can be effected. Otherwise, equality before the law becomes a cynical epithet empowering only those with resources to hold others accountable to the law. In order for equality before the law to be an effective right for every person, rather than a sinecure for the endowed, it must incorporate a right to the provision of legal counsel for the needy.

If the minimal conception of equality - equality before the law - supports a right to the provision of legal counsel, the stronger conception of equality - equality of opportunity - will support this right even more, for the reasons stated earlier. It goes without saying that those who argue for yet an even stronger version of equality - equality of result -would also endorse this right. In the end, regardless of the view of equality one adopts, each would support a right to the provision of counsel.

A right to the provision of counsel in every case of need would be very expensive. As stated earlier in this chapter, equality of opportunity (including the provision of resources) should be advanced to the extent that is practically possible. This likely means that not all needy cases can be met. What, then, is the minimum scope for the operation of a right to the provision of legal counsel?

Legal counsel should be provided in cases of greatest need as determined by the importance of the matter and the gravity of its consequences. These criteria are met where matters involving fundamental human rights as found in the Canadian and New Brunswick Charters of Rights and Freedoms, and their derivatives - essential legal services[35] - are at stake. Access to the right would depend on an objectively established financial needs test together with the foregoing two basic criteria.

RECOMMENDATION:

2.5 It is recommended that the New Brunswick Charter incorporate legal or judicial rights, including the right to a 'full and equal, public and fair hearing by an independent and impartial tribunal' and the right to be represented or assisted by an advocate - including legal counsel - before tribunals.

2.6 The recommendation respecting legal or judicial rights contemplates the appointment of decision-makers on the basis of an objectively determined merit system.

2.7 It is recommended that the New Brunswick Charter of Rights and Freedoms incorporate a right to the provision of legal counsel in cases involving fundamental rights and essential legal services. A significant part of this right is subsumed in the terminology of section 34 of the Quebec Charter.

2.8 The recommendation respecting legal representation contemplates that legal counsel may be provided by the provincial government in cases of greatest need.

E) Economic, Social and Cultural Rights

1) Generally

The antecedents to the placement of economic, social and cultural rights in a New Brunswick Charter are the International Bill of Rights and the Canadian and Quebec Charters. The extent of this recognition is set out in the following table.

Table 2B - Economic, Social and Cultural Rights Provisions

	UDHR	ICCPR	ICESCR	CAN	QUE
Social security economic, cultural and social rights	22	-	9,all	36	-
Right to work, equal pay, just wage, trade union participation	23	-	6 - 8	6	46
Right to rest and leisure	24	-	7	-	-
Right to adequate standard of living	25	-	11	-	45
Right to education	26	-	13, 14	23, 29	40-2
Cultural rights; copyrights	27	27	15	27	43
Health rights	25	-	12	-	-

The United Nations Convenent on Economic, Social and Cultural Rights declares principles of minimum conditions of work including the right to work, work conditions, trade union participation, social security and social insurance; a minimum standard of living; family protection; physical and mental health; education and cultural life.

The member States, including Canada, have made this Covenant, 'undertaking to take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislation measures.'

2) Economic Rights

With respect to economic rights, note may be taken of the provisions of Part III of the Constitution Act, 1982 whereby the New Brunswick Government has committed itself to:

36(1)(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

The translation of such a firm commitment into a New Brunswick Charter is a challenge worthy of further study and action.

3) Cultural and Language Rights

In Chapter Four of this report, opinions and recommendations are formulated with respect to the promotion of our multicultural heritage within a bilingual province. These include recommendations that:

- the New Brunswick Charter include a provision recognizing the equality of both official language communities in New Brunswick and recognizing the duties which flow from that equal status as outlined in Bill 88.
- the New Brunswick Charter recognize the multicultural character of each official linguistic community and recognize also the collective right of any linguistic, ethnic and religious group to speak its own language, to enjoy its own culture and to practice its own religion.
- the New Brunswick Charter make explicit reference to the duty which lies on the State to safeguard the enjoyment of human rights by positive measures aimed at the promotion and preservation of our linguistic, ethnic and religious minority

communities, within limitations such as the desire and initiative of the minorities themselves, political stability, level of economic development and proportionality of costs and benefits.

- the New Brunswick Charter include language as a proscribed ground of discrimination.

- the New Brunswick Charter expressly include as one of its legal rights, the right to be heard in the official language of one's choice by a judge who speaks and understands the official language chosen.

- the New Brunswick Charter include a provision recognizing the right of access, in the official language of one's choice, to public service in the Province.

- the New Brunswick Charter include a right to public schooling for one's children in the language of one's choice. Such a right would guarantee schooling in one's own language to all New Brunswick students whether their first language be English or French and would also guarantee the right to immersion schooling where the parents desire their child's second official language be the language of instruction.

4) Educational Rights

Article 13 of the U.N. Convenent on Economic, Cultural and Social Rights, echoing the principles enumerated in section 26 of the Universal Declaration, provides that:

> 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
>
> 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
>
> > (a) Primary education shall be compulsory and available free to all;
> >
> > (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

> (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
>
> (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

Sections 40, 41 and 42 of the Quebec Charter provide:

> 40. Every person has a right, to the extent and according to the standards provided for by law, to free public education.
>
> 41. Parents or the persons acting in their stead have a right to require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.
>
> 42. Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.

New Brunswick has made a large commitment to educational rights and to the promotion of human rights through education. Thus, section 5 of the Schools Act provides that:

> 5(1) Notwithstanding the Age of Majority Act, the Minister shall provide free school privileges for every person from six to twenty years of age...
>
> 5(1.1) Notwithstanding the Age of Majority Act, the Minister shall provide free school privileges to persons from three to twenty-one years of age inclusive who are exceptional pupils receiving special education programs.[36]

The conferral of a right to education (including training) must necessarily include the provision of resources by which the right might be made meaningful, e.g., daycare services, financial support for adult students. A right to education (including training) will ensure the promotion of the concept of equality of opportunity, cornerstone of human rights.

The New Brunswick Departments of Education and Advanced Education and Training have taken significant steps toward the promotion of this ideal. For example, the Minister of Education has recently released a Statement on Multicultural/Human Rights Education. The Statement presents a series of Guiding Principles that form the basis for the document. These are:

> That every individual has a right to be educated in a school system that is free from bias, prejudice and intolerance.

> That any manifestation of discrimination on the basis of gender, race, ethnicity, culture, or religion by any persons in the public school system is not acceptable.
>
> That school programs and practices promote students' self-esteem and assist in developing a pride in one's own culture and heritage.
>
> That the school curriculum be free of bias and stereotyping and open to the study of the contributions and achievements of all peoples.
>
> That multicultural community groups be actively involved in shaping policy and practices in the schools.
>
> That employment and promotion practices will be based on merit and ability and free from discriminatory barriers.
>
> It is intended that school districts will study the Minister's Statement and develop local policies that reflect the content of the Statement.[37]

This initiative complements the decision by the New Brunswick Human Rights Commission to devote special attention to its educational and promotional functions.

Based upon the expression of desire for such educational and promotional work at the community college and university level,[38] it would appear that the potential reach of such a policy might be to all fields of education.

It is suggested that any inclusion of educational rights in a New Brunswick Charter should necessarily extend to the design of educational programs for the promotion of fundamental rights and freedoms.

RECOMMENDATION:

2.9 **It is recommended that the New Brunswick Charter incorporate economic, cultural and social rights within its provisions and, in particular, the right to education and training.**

2.10 **In the incorporation of education rights, it is recommended that recognition be given to the necessity of providing the resources to ensure that the right is a meaningful one for all persons. Legislative recognition should also be given to the importance of the promotion of human rights principles, and the unique bilingual status of New Brunswick's multicultural society.**

F) Anti-Discrimination Rights

This report recommends comprehensive anti-discrimination provisions as set out below in Chapter 4.

G) Special Community Rights

1) Aboriginal Rights

The English and French have been called the "founding nations" of Canada and New Brunswick. However, this cannot be wholly true in view of the fact that, on their arrival, they encountered the organized societies of indigenous aboriginals - the "first nations" - who have occupied the land since time immemorial. In New Brunswick, the aboriginals are comprised chiefly of the Micmac who traditionally occupied the north shore from the Gaspé to Nova Scotia and the head of the Bay of Fundy, and the Maliseet who occupied the St. John River Valley and the Passamaquoddy region.[39]

The history of the relations between the European new-comers, and their ancestors, on the one hand and the aboriginal peoples and their ancestors, including the Métis, on the other is well-documented.[40] It is a complex history which illustrates that, from the outset, the European cultures and values dominated and displaced the aboriginal cultures and values. The accumulation of power which was concomitant with the European ascendancy, was exercised to the advantage of the dominant group. Aboriginals were dispossessed of their lands and hunting grounds and relegated to reserves whereupon their lives were administered by bureaucratic policies of government design in which aboriginals had little, if any, say. As a result of a chequered history, today's aboriginals do not enjoy the freedom, independence or self-sufficiency enjoyed by their ancestors. Rather, today's aboriginals occupy the lowest rung on the socio-economic ladder. They have the worst housing in Canada, the highest rates of alcoholism, the lowest rates of education, the highest rates of suicide, the highest rates of infant mortality, and the highest rate of unemployment of any group.[41]

The condition of aboriginals was seen by some as a product of the special status accorded Indians in the constitutional arrangement. In June, 1969, a White Paper[42] on Indian policy was issued by the federal government in which was proposed the repeal of both subsection 91(24) of the Constitution Act, 1867[43] which gives the federal government jurisdiction over "Indians and Lands reserved for the Indians", and the Indian Act[44] which provides a definition by which status as an Indian is established, and a scheme of rights and duties for those with Indian status. The policy was to assimilate Indians into mainstream society. The White Paper was greeted with widespread hostility from the aboriginal community which saw it as a means to emasculate aboriginal rights.[45]

The White Paper was officially withdrawn in 1970 and, since that time, there has been growing acceptance of the concept of special status for aboriginals.[46] The Courts have recognized this special status on the basis of aboriginal rights with respect to land claims.[47] The federal government too, has acknowledged this special status in relation to land claims[48] (although it has declined to extend this recognition to the aboriginals of the Maritimes saying that aboriginal title here has been "superseded by law"). Most significantly, the new Constitution Act, 1982[49] entrenched an acknowledgment of the special status of aboriginals within the Canadian constitutional regime. In the result, aboriginals today have had their special status recognized by the Court, by the federal government, and by the Constitution.

Under section 91(24) of the Constitution Act, 1867 the federal government has jurisdiction to enact laws concerning "Indians and Lands reserved for the Indians". Through the Indian Act, Parliament has defined which persons are entitled to Indian status and has legislated in relation to these persons even with respect to matters which are otherwise within provincial purview. The validity of the complete extent of this legislation is uncertain, especially as it relates to matters squarely within provincial jurisdiction such as property and education.[50] As for "Lands reserved for the Indians", these are under federal legislative authority which permits the federal Parliament to administer and control the lands. However, the title to these lands is vested in the Province subject to any rights of ownership in the Indians.[51]

Provincial legislative jurisdiction over aboriginals is extensive but again uncertain in reach. It has been established that the province may legislate in relation to Indians and lands reserved for Indians under the provincial heads of power enumerated in the Constitutional Act, 1867.[52] Provincial jurisdiction is limited by five exceptions, some of which are unsettled[53] in scope, and section 88 of the Indian Act which says that provincial laws of general application apply to Indians "except to the extent that such laws are inconsistent with [the Indian Act] or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under [the Indian Act]". Arguably, the 1985 Supreme Court of Canada case Dick v. R.[54] has provided the opportunity for a wider application of provincial laws to Indians than was theretofore available, because of the expansive treatment the Court gave to the words "laws of general application".[55]

The foregoing illustrates that the constitutional division of federal and provincial powers respecting aboriginals is not conclusively drawn. In some respects, the dividing line is faint, in others it is in motion and, in others still, it has yet to be drawn. This lack of certainty is significant from the provincial perspective in light of the increasing demands of natives for self-determination through self-government.

The idea of aboriginal self-government is receiving wide-spread support. Both national and provincial aboriginal associations call for self-government.[56] The Prime Minister has endorsed self-government.[57] Recently, the Canadian Bar Association adopted a resolution in favour of self-government.[58]

Conceptions of self-government vary from a weak "privilege" of self-government liable to federal and provincial alteration to a strong "right" of self-government founded on the notion of independent state-hood.[59]

The unhappy circumstance of New Brunswick's aboriginal peoples is a product of historical and pervasive discrimination by government and individuals. This process of discrimination has deprived aboriginals of the land and resources which were fundamental to the self-determination they once enjoyed. A New Brunswick Charter of Rights is, therefore, a proper vehicle by which to speak to the problem of discrimination against aboriginals.[60]

In their dealings with aboriginals, governments have failed. Now, aboriginals want to be self-governing.

RECOMMENDATION:

2.11 **It is recommended that the provincial government engage in consultation with New Brunswick's aboriginal peoples and the federal government, if appropriate, to determine the desirability and content of an aboriginal right to self-government which, to the fullest extent of provincial legislative competence, should be included in the New Brunswick Charter.**

2) Environmental Rights

Fundamental human rights, such as freedom or equality, can only be meaningful if they are recognized and enforced within a context which ensures their preservation. It makes little sense to talk of protecting human rights if the very existence of humans and the resources they depend upon are threatened by environmental pollution and degradation. In this sense, a healthy and sustainable environment may be seen as a "condition" of human rights. For fundamental human rights to be preserved, today and in the future, this condition must be met. Not long ago, the environment itself was capable of meeting this condition. However, since the second industrial age following World War II, the environment has come under so much pressure that it can no longer be considered to be self-sustaining. Recognition of a right to a healthy and sustainable environment is now necessary, and therefore, timely.

Various legislatures have considered this need in recent years. At the provincial level, environmental rights laws have been introduced into the Alberta, Saskatchewan[61] and Ontario legislatures in the last decade. While most of these did not pass into legislation, Ontario's Bill 12, "An Act Respecting Environmental Rights in Ontario"[62] continues to be under consideration. For its part, Quebec did enact a qualified "Environmental Rights Bill" which grants every Quebec resident the "right to a healthy environment and to its protection, and to the protection of the living species inhabiting it ...".[63]

Entrenching a right to a healthy and sustainable environment in the provincial Charter will assist in the removal of legal obstacles which presently hinder environmental protection.[64] One such obstacle is that of "standing" in the context of public nuisance cases. Nuisance is concerned with damage to property, usually an injury to the use and enjoyment of land. There are two types of nuisance actions, private nuisance and public nuisance.[65] Under private nuisance one person, whose use and enjoyment of property has been interfered with by the polluting activities of another person, may bring a legal action against the polluter. In such a case, the courts will be prepared to listen to the complainant because his or her property rights are at stake. Here, the complainant has "standing" before the courts. However, in a public nuisance case, standing is difficult to establish unless the complainant can show that a particular loss has been suffered which other members of the public have not suffered. A public nuisance arises when the interests harmed are by widespread pollution. Typically, the injury sustained by any one individual is the same as the injuries sustained by other members of the public. No individual has sustained a "particular" injury and, therefore, no individual has standing to complain.[66] The law attempts to ameliorate this problem by recognizing that the Attorney-General, as a representative of the public, has standing to take a legal action to enjoin the continuance of the public nuisance. However, enroling the Attorney-General's participation may be cumbersome and, additionally, in a case where the complaint is against the government, one of its agents, or a Crown corporation, there may be a disincentive to the Attorney-General's participation. An entrenched right to a healthy and sustainable natural environment would recognize that every person has an interest in the environment, and would permit any person the standing to bring a legal action to protect that interest. The present law on standing would have to adjust itself in order to become consistent with the paramount right to a healthy and sustainable natural environment.[67]

Another legal obstacle which confounds environmental protection is the requirement that the complainant prove that the defendant has "caused" injury. In the context of environmental problems, conclusive proof of causation may be impossible. This could be because the consequences of the polluting activities of any one defendant are matched by similar adverse consequences attributable to others engaging in the same polluting activity, e.g., acid rain, or because the harmful effects of a polluting activity lie latent for a prolonged period of time only to be manifested at a place or time remote from the polluting activity, as some allege is the case with toxic chemicals. In some environmental contamination situations, then, it may be socially provident to require a polluter to justify its activities, once a complainant has established that those activities impose substantial risk or probability of harm.[68] Requiring a defendant to show that its activities do not impose an unacceptable risk of environmental harm is more consistent with a paramount right to a healthy and sustainable environment. So long as the protection falls short of imposing a constitutionally-invalid reverse onus on a defendant, such a requirement would appear preferable to the present rule which imposes the sometimes impossible task on a complainant of conclusively proving that the defendant's activities cause harm.[69]

RECOMMENDATION:

2.12 It is recommended that the New Brunswick Charter recognize a right to a healthy and sustainable environment.

H) Supremacy of Legislation, Application to Crown

The New Brunswick Human Rights Code presently has no 'supremacy' provision, although judicial interpretation of Canadian Codes has certainly created such a result. Nevertheless, there does seem to be merit in explicitly conferring legislative supremacy under a New Brunswick Charter.

This step would ensure that a more specific or later enactment would not take precedence over a protection conferred by the New Brunswick Charter. In so doing, reference may be made to the nine Canadian jurisdictions that have already done so. The provisions of sections 52 and 53 of the Quebec Charter are particularly comprehensive.

> 52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.
>
> 53. If any doubt arises in the interpretation of a provision of the act, it shall be resolved in keeping with the intent of the Charter.

[See also Alta, s.1; B.C., s.22(2); Man., s.58; Nlfd., s.6; Ont., s.46(2) & (3); P.E.I., s.2; Sask., s.44 and Yukon, s.36]

Moreover, the provision of section 9 of the New Brunswick Code should be retained in any future human rights enactment, i.e., that "This Act binds the Crown in right of the Province".

RECOMMENDATIONS:

2.13 It is recommended that the New Brunswick Charter contain a clause establishing that it is a supreme provincial enactment.

2.14 It is recommended that the New Brunswick Charter bind the Crown.

END NOTES

1. This form of liberty has been termed negative freedom: See I. Berlin, "Two Concepts of Liberty" in Four Essays on Liberty, (London: 1969), p. 122.

2. 8-9 Elizabeth II, c.44.

3. Constitution Act, 1980, Schedule B to the Canada Act, 1982, 1982, c.11 (U.K.).

4. [1974] S.C.R. 1349.

5. Ibid. at p. 1366, per Ritchie J.

6. In this sense the Bill of Rights recognition of "equality before the law" added little, if anything, to the state of the law as it stood prior to the Bill's enactment and which already recognized that no one was above the law, Roncarelli v. Duplessis, [1959] S.C.R. 121.

7. The second proposition of Dicey's principle of the rule of law is: Equality before the law, excluding the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens; A.V. Dicey, Introduction to the Study of the Constitution, 10th ed. by Wade, (London: Macmillan, 1961), pp. 202-3.

8. Lavell, in particular, was broadly condemned. See, for example, P. Hogg "A.G. - Canada v. Lavell, Case Comment", (1974), 52 Can. Bar Rev. 263.

9. R. Dworkin, "Liberalism" in A Matter of Principle (Oxford: Clarendon Press, 1986) at p. 181.

10. A. Bayefsky, "Defining Equality Rights" in Bayefsky & Eberts eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) at p. 1.

11. R. Nozick, Anarchy, State and Utopia, (Oxford: Blackwell, 1974) at pp. 161-163.

12. J. Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971).

13. G.L. Gall, Ed. Civil Liberties in Canada: Entering the 1980's (Toronto: Butterworths, 1982), p. 212.

14. Interview with Mr. Justice Mark MacGuigan, Stratford, Ontario, May 11, 1989.

15. New Brunswick Synoptic Reports of the Legislative Assembly of New Brunswick 1966, v. 1 at 106 (April 1, 1966).

16. Appendix D-5.

17. Ibid. (The cite is from page 2 of an article enclosed with Mr. Bourque's response, i.e. the text of a paper delivered by Mr. Chamberland to the XX^{eme} congrès de l'institut de droit d'expression française.)

18. Telephone interview with Mr. Milton Woodward - September 29, 1989.

19. Telephone interview with Mr. David Porter - September 29, 1989.

20. R.S.N.B. 1973, c.F-2.2.

21. R.S.N.B. 1973, c.V-2.1.

22. R.S.N.B. 1973, c.O-0.1.

23. S.N.B. 1989, c.I-12.21.

24. [1985] 2 S.C.R. 573.

25. Singh et al v. Minister of Employment and Immigration [1985] 1 S.C.R. 177.

26. Ibid. at 224.

27. Appendix D-9.

28. Submission by the International Ombudsman Institute to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (Edmonton: International Ombudsman Institute, Dec. 31, 1986) p. 5-6.

29. [1985] 2 S.C.R. 486.

30. Ibid. at 501.

31. Ibid. at 502-03.

32. Report of the Canadian Bar Association Committee on The Appointment of Judges in Canada, (Ottawa: Canadian Bar Foundation, 1985) p. 5.

33. Ibid. at p. 57.

34. Roncarelli v. Duplessis, [1959] S.C.R. 121.

35. CBA, Report of the National Legal Aid Liaison Committee, (Ottawa: Canadian Bar Association, 1985)

36. Schools Act. R.S.N.B. 1973, c. S-5.

37. N.B. Department of Education. "Education New Brunswick" (Fredericton: Department of Eduction, 1989) v. 11, no. 6, p. 1.

38. Carolyn Ennis; Noel Knockwood, First National Native Human Rights Conference, Tobique, June 29, 1989.

39. R. Bartlett, Indian Reserves in the Atlantic Provinces of Canada, (Saskatoon: University of Saskatchewan Native Law Centre, 1986) at pp. 13-14.

40. See, for example, P. Cumming and N. Mickenberg eds., Native Rights in Canada, 2nd ed., (Toronto: General Publishing Co. Limited, 1972).

41. G. P. Gould & A.J. Semple, eds., Our Land: The Maritimes (Fredericton: Saint Annes Point Press, 1980).

42. Dept. of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy, 1969.

43. Formerly, British North America Act, 1867, 30 & 31 Vic., c.3.

44. R.S.C. 1970, c.I-6.

45. D. Sanders, "The Renewal of Indian Special Status" in A. Bayefsky & M. Eberts, eds., Equality Rights and The Canadian Charter of Rights and Freedoms, (Toronto: Corswell, 1985) 529 at 539.

46. Research by Prof. J. Fletcher of the University of Toronto indicates that there is substantial public support for the preservation of unique rights for natives: Summary of Survey Results prepared for the New Brunswick Office of the Ombudsman, July 1989, p. 4.

47. See, for example, Calder v. A.G.B.C., [1973], S.C.R. 313.

48. Dept. of Indian and Northern Development, In All Fairness: A Native Claims Policy, Comprehensive Claims, 1981.

49. Enacted by the Canada Act, 1982 (U.K.), c.11, Sched. B. Section 25 protects rights of aboriginal peoples from other sections of the Charter of Rights and Freedoms, s.35 recognizes and affirms existing aboriginal and treaty rights and s.37 provided for a First Ministers' Conference to which representatives of aboriginal peoples would be invited.

50. K. Lysyk, The Unique Constitutional Position of the Canadian Indian, (1967), 45 Can. Bar Rev. 513.

51. St. Catherine's Milling and Lumber Co. v. R. (1888), 14 App. Cas. 46 (P.C.); G.V. La Forest, Natural Resources and Public Property under the Canadian Constitution (Toronto: U. of T. Press, 1969).

52. P. Hogg, Constitutional Law of Canada, 2nd. ed., (Toronto: Corswell, 1985) at p. 558.

53. P. Hogg, Ibid., at 558-60.

54. Dick v. R. and Attorney General of Canada and Attorney General of Nova Scotia, [1985] 2 S.C.R. 309.

55. This argument is advanced by R. Carter in "The Application of Provincial Laws To Status Indians Under Section 88 of the Indian Act", Continuing Legal Education, The Law Society of Saskatchewan, Native Law Seminar, 1987, at pp. 4-9.

56. For example, see the position of the National Indian Brotherhood, Assembly of First Nations as stated by Grand Chief Billy Diamond in his Opening Statement on Aboriginal and Treaty Rights to the Federal/Provincial/Aboriginal Ministerial Meeting, 28 February, 1983, in Ottawa.

57. At the First Ministers' Conference held 2-3 April, 1985, Prime Minister Brian Mulroney said:

> Constitutional protection for the principle of self-government is an overriding objective because it is the constitutional manifestation of a relationship, an unbreakable social contract between aboriginal peoples and their governments.

Reported in Indian and Northern Affairs, A Record of Aboriginal Constitutional Reform, Ottawa, 1987, p. 5.

58. See Proceedings of the Canadian Bar Association Annual Meeting, Vancouver, August, 1989, implementing recommendations of the Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action (Ottawa: The Canadian Bar Association, 1988).

59. R. Leavitt, Maritime Native Studies (2nd. Draft), (Fredericton: Micmac-Maliseet Institute, U.N.B., June, 1988). pp. 247-51 and 321-28.

60. "It is our view that charter rights should be incorporated at the provincial level to assist in addressing past inequities": Letter of June 5, 1989 from R. Paul, Band Manager, Kingsclear Indian Band, to C. Ferris.

61. Legislative Assembly of Alberta, Bill 222, "The Environmental Bill of Rights" introduced by R. Clark, First Session, 19th Legislature, 1979; Legislative Assembly of Saskatchewan, Bill 23, "An Act to Establish an Environmental Magna Carta for Saskatchewan", 1982.

62. Legislature of Ontario, Bill 12, "An Act Respecting Environmental Rights in Ontario", introduced by R. Grier, 2nd Session, 34th Legislature, 1st reading, May 15th, 1989.

63. Environment Quality Act, R.S.Q. 1977, C.Q-2, S. 19.1.

64. P. Muldoon, "The Fight For an Environmental Bill of Rights", (1988), 15 Alternatives 33.

65. See Street, The Law of Torts (5th ed. 1972), at p. 212.

66. Hickey v. Electric Reduction Co. of Canada (1970), 21 D.L.R. (3d) 368 (Nfld.).

67. In the familiar manner in which many laws have had to be corrected so as to align with the prescriptions of the Charter of Rights and Freedoms.

68. H. Versteeg, "The Spruce Budworm Programme and the Perception of Risk in New Brunswick", in Pesticide Policy: The Environmental Perspective, (Ottawa: Friends of the Earth, Canada, 1984) at pp. 86-90; see also subs. 9(1), Bill 12 supra, at note 2, and T. Page "A Generic View of Toxic Chemicals and Similar Risks" (1978), 7 Ecology Law Quarterly 207.

69. Requiring that the defendant justify its actions in cases where the plaintiff can establish only a significant risk of harm, (because actual proof of harm is impossible), is tantamount to reversing the onus. However, reverse onus situations are justified in law where questions of fact about which the defendant is more knowledgeable than the plaintiff arise. Such is the situation in bailment cases where the defendant bailee has possession of the plaintiff bailor's property which has been damaged. Here the defendant must prove that the plaintiff's loss was not due to his or her negligence. See Pratt v. Waddington (1911) 23

D.L.R. 178. In many environmental cases, the defendant is often more knowledgeable than the plaintiff.

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CHAPTER THREE

COORDINATED HUMAN RIGHTS PROTECTION AND AN INDEPENDENT NEW BRUNSWICK HUMAN RIGHTS COMMISSION

I. Introduction

The promotion of the concept of equality of opportunity under the aegis of a comprehensive New Brunswick Charter of Rights and Freedoms will require a disciplined diffusion and coordination of resources if a harmonious balancing of rights, freedoms and responsibilities is to be effectively promoted within the Province.

It is envisaged that the existing protection of fundamental rights and freedoms required by the U.N. International Bill of Rights will continue to be effected by the authorities charged with their administration. Further, it is recommended that a Cabinet level Committee - the Cabinet Committee on Human Rights - coordinate and promote the furtherance of such rights by the responsible authorities. It would also serve as the body responsible for reporting to Ottawa and New York with respect to New Brunswick's compliance with, and promotion of, its international obligations. Based on the fundamentality of legal rights affected by the New Brunswick Charter, such a committee would comprise those authorities that have specific functions under the U.N. International Bill of Rights - including the Departments of Justice, Solicitor General, Labour and Multiculturalism, Education, Advanced Education and Training, Health and Community Services, Income Assistance and Environment.[1]

It is also foreseen that, within the necessary hegemony of Cabinet, the New Brunswick Human Rights Commission would have access to, and a consultation and promotional function with respect to, such a Committee.

This Cabinet committee could also serve as the means by which the valuable work completed and insights gained by other public and private bodies could formally assist in the protection of human rights within our Province.

In making this recommendation, one is mindful that Communications New Brunswick - an integral component in the promotion of human rights - has recently assumed the status of a Cabinet function.

This approach to human rights reform contemplates a New Brunswick Human Rights Commission that is an independent legislative body with an expanded mandate to promote, educate, consult and coordinate human rights programs and to execute its compliance functions in a more apparently independent and objective fashion.

This model would have the following characteristics:

a) an independent Commission responsible directly to the Legislative Assembly through a Standing Committee on Human Rights;

b) an expanded Commission mandate to promote human rights through the Commission and its staff and, more particularly, through its consultative and coordinating role vis-à-vis central agencies;

c) an expanded Commission, the expertise of whose members complements the remedial objective of the Human Rights Code;

d) an expanded promotional and educational function within the Commission;

e) a compliance function within the Commission that is separate from the promotional and educational one;

f) a panel of tribunal members comprised of legal practitioners with administrative law and/or related expertise;

g) a full-time executive director charged with broad complaint handling and administrative responsibilities;

h) administrative support provided by the Departments of Finance, Supply and Services and the Legislative Assembly; and

i) sponsorship of human rights legislation and review of human rights legislative proposals by the Office of the Attorney General and the Premier of New Brunswick in consultation with the Cabinet Committee on Human Rights and the Commission.

The incorporation of such a human rights delivery system would place New Brunswick on the apex of human rights protection in Canada.

II. The Role of the Legislative Assembly

The Commission presently 'reports' to the public through the Minister of Labour and Multiculturalism. The Commission is viewed as isolated from the Executive Council and the Legislature. As Mr. Reg Paul, the Manager of the Kingsclear Indian Band, has suggested:

> The Human Rights Commission should be made accountable to the Legislature directly. As you are aware, it currently reports to a sole Minister. The possibility of a conflict of interest situation is very real in its current set-up.[2]

There is much to be said for the establishment of a direct reporting link between the Commission and the Legislature. The Office of the Ombudsman has this status and, since 1985, has reported to the Legislature through a Standing Committee on the Ombudsman. The Office and the Legislature have viewed this development as being a very positive one.[3]

This view was shared by the Department of Labour Evaluation, which concluded that:

> The possibility of partiality given the Commission's reporting relationship to government may detract from the Commission's ability to safeguard the equality rights of New Brunswickers.[4]

Based upon this concern, the Evaluation recommended that:

> further study be given to the Human Rights Commission being responsible directly to the Legislative Assembly rather than reporting to Government through the Department of Labour as a means of addressing the appearance of partiality in the Commission's current reporting relationship.[5]

It is envisaged that a Standing Committee on Human Rights, established under the rules of the Legislative Assembly, would have the authority to consult with the Commission and with any of the authorities charged with human rights protection under the Code, to share information with other members of the Legislature Assembly and to ask questions or make suggestions. The establishment of such a committee would serve a number of vital purposes including:

a) the provision of a specific forum by which members of the Legislative Assembly could provide the Public Service with its opinions and recommendations on the protection of human rights;

b) a public forum by which members of the Commission, the Civil Service and the public could communicate on this mandate;

c) public scrutiny of the administration of the Commission;

d) a direct channel by which the Commission could make its opinions and recommendations known to the Legislature; and

e) the conferral of the measure of independence which the public believes is necessary for the Commission to heighten the level of respect which it has in the community.

RECOMMENDATION:

3.1 It is recommended that the New Brunswick Charter establish the New Brunswick Human Rights Commission as an independent legislative Office that reports to the Legislative Assembly through a Standing Committee on Human Rights.

III. The Role of the Executive Council and Central Governmental Authorities

This report has recommended that the New Brunswick Charter would recognize the specific human rights responsibilities of the following authorities: the Department of Justice, the Department of Education, the Department of Advanced Education and Training, the Department of Labour and Multiculturalism, the Department of Health and Community Services, the Department of Income Assistance, the Department of the Environment and the Department of Solicitor General. In large part, this action has served to confirm the traditional role played by each of these authorities. It would serve the important objective of raising to near constitutional proportion the significance of such functions and, perhaps more importantly, require the incorporation of human rights promotion as part of the respective departmental mandates.

Moreover, it would finally enable a Cabinet Committee to consult on a regular structured basis with independent human rights agencies, including the New Brunswick Advisory Council on the Status of Women, the Premier's Council on the Status of Disabled Persons, the New Brunswick Police Commission, the New Brunswick Youth Council and the Office of the Ombudsman.

In addition to the legislative provisions, it is recommended that the New Brunswick Human Rights Commission play a coordinating role in insuring that the Government of New Brunswick promotes human rights awareness and respect. To this end, it is recommended that the Legislature confer on the Commission the right to consult on reasonable notice with any member of the Executive Council and periodically with the Executive Council - in particular, through the Cabinet Committee on Human Rights. Moreover, the Commission, as a body or through its committees, should have the authority to invite representatives of governmental authorities to any of its deliberations and to appoint government functionaries as ex officio members of any of its committees. Such action might be taken by the conferral of a by-law making power on the Commission.

RECOMMENDATIONS:

3.2 **It is recommended that the Executive Council of the Province establish a Committee on Human Rights, comprised of those of its members charged with responsibilities under the U.N. International Bill of Rights. The purpose of the Committee would be to a) co-ordinate the Province's compliance with the legal requirements of the U.N. International Bill of Rights; b) co-ordinate, with the advice of the Commission and other human rights agencies, the promotion and extension of respect for fundamental rights, freedoms and responsibilities, and c) assume the responsibility for the completion of New Brunswick's reporting responsibilities under the U.N. International Bill of Rights.**

3.3 **It is recommended that the New Brunswick Charter confer on the Chairman of the Commission the authority to consult with any member of the Executive Council of the Province.**

IV. The Characteristics of the New Brunswick Human Rights Commission

A) A Broad Mandate

The mandate of the New Brunswick Human Rights Commission is presently set out in section 12 of the Human Rights Code, namely,

> 12. The Commission has the power to administer this Act and without limiting the generality of the foregoing, it is the function of the Commission

a) to forward the principle that every person is free and equal in dignity and rights without regard to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status or sex;

b) to promote an understanding of, acceptance of, and compliance with this Act, and

c) to develop and conduct educational programmes designed to eliminate discriminatory practices related to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status or sex.

As in New Brunswick's section 12, all other Canadian human rights legislation (except B.C. and the N.W.T.) contains a provision that sets out the Commission's mandate. The following table sets out the types of "purposes" provisions found in the various statutes.

Table 3A - Mandate of the Commission

To forward the recognition of the equal dignity and rights of all individuals	Fed., s.27(1)(b); N.B., s.12(a); Alta., s.16(1)(a); Man.,s.4(a),(b); Nfld., s.19(a); Ont., s.28(a); Que., s.66; Sask., s.25(a),(e); Yukon, s.15(1)(a).
To promote compliance with Act	Fed., s.27(1)(h); N.B., s.12(b); Alta., s.16(1)(b): Man., s.4(e), 6; Nfld., s.19(b); Ont., s.28(b); Sask., s.25(b).
To recommend/approve affirmative action programs	Fed., s.16(2); N.B., s.13; N.S., s.19; Ont.,s.28(c).
To research/develop programs of public education	Fed., s.27(1)(a); N.B., s.12(c); Alta., s.16(1)(c); Man., s.4(c),(d); Nfld., s.19(c); N.S., s.18(b); Ont., s. 28(d); P.E.I., s.18(b); Que., s.71(4); Sask., s.25(c),(d); Yukon, s.15(1)(c), 15(2).
To review any statute or or policy inconsistent with Act	Fed., s.27(1)(g); Ont., s.28(e); Que., s.71(6) - note also N.S., s.13(1).
To investigate complaints of discrimination and take action to resolve complaints .	Nfld., s.19(h); N.S., s18(h); Ont., s.28; P.E.I. s.18(e); Que., s.71(1), (9).
To inquire into/investigate incidents of discrimination in a community	Ont., s.28(f), (g).

To promote anti-discrimination programs of agencies or groups	Fed., s.27(1)(c); Alta., s.16(1)(d); Nfld., s.19(f) N.S. s.18(d), (f); Ont., s.28(h); Que., s.71(8); Sask., s.25(f).
To approve anti-discrimination programs of agencies or groups	Fed., s.16(2); N.S., s.19; P.E.I., s.19.
To encourage and conduct research into human rights	Fed., s.27(1); N.S., s.18(c); Que., s.71(5); Sask., s.25(f).
To advise the government on recommendations made by others or itself	Fed., s.27(1)(e); Nfld., s.19(d),(e); N.S., s.18(e); P.E.I., s.18(c); Que., s.71(3),(7)
To promote the principle that cultural diversity is a fundamental human value and a basid human right	Sask., s.25(g); Yukon, s.15(1)(b).
To promote the settlement of complaints	Que., s.71(2); Yukon, s.15(1)(d)
To enforce Act	N.S., s.18(a); Ont., s.28(i); P.E.I., s.18(a); Yukon, s.15(1)(e).
To perform further functions as assigned	Nfld., s.19(h); N.S., s.18(h); Ont., s.28(j); P.E.I. s.18(e).
To report as required	Nfld., s.19(g); N.S., s.18(g); P.E.I., s.18(d).

It is concluded that, in order for the New Brunswick Human Rights Commission to fulfill a mandate that will forward the principle of equality of opportunity, its legislation should be afforded the broadest possible purposes, including the full opportunity to develop a promotional, educational, coordination and compliance mandate. This mandate should be made explicit for the benefit of both the Commission and the public.

RECOMMENDATION:

3.4 **It is recommended that the New Brunswick Charter provide that the mandate of the Commission shall be:**

a) **to further the recognition of the equality and dignity of all individuals;**

b) **to promote the principle that cultural diversity is a fundamental human value;**

c) to promote and effect compliance with the Charter;

d) to review any law or policy with respect to conformity with the Charter;

e) to research and develop programs of public education;

f) to encourage and conduct research into human rights;

g) to advise the government on recommendations respecting human rights made by others;

h) to investigate complaints of discrimination and promote settlement or resolution of complaints;

i) to investigate systemic discrimination on its own initiative;

j) to promote or approve anti-discrimination programs of agencies or groups;

k) to recommend or approve affirmative action programs;

l) to perform further functions as required in fulfillment of the Charter's mandate;

m) to report as required.

B) Independence of Appointment

The New Brunswick Human Rights Code presently provides that:

10(1) There shall be a Commission to be known as the New Brunswick Human Rights Commission.

10(2) The Commission shall be composed of three or more members as may be fixed by the Lieutenant-Governor in Council.

10(3) The members of the Commission shall be appointed by the Lieutenant-Governor in Council.

10(4) The Lieutenant-Governor in Council may designate one of the members as chairperson

10(5) The Lieutenant-Governor in Council may fix the remuneration of the members of the Commission.

11 The Commission is responsible to the Minister for the administration of this Act.

The role of the New Brunswick Human Rights Commission is to foster equality of opportunity and to eliminate discrimination for the betterment of all citizens. The very nature of its role requires that the Commission not only be, but be seen to be, independent from the control of all government authorities. Otherwise, the credibility of the Commission can be vulnerable to erosion, particularly when it is asked to investigate a branch of the government. Furthermore, the promotion of human rights is not properly the domain of only one government department; rather, it requires the support of several.

It is essential that the New Brunswick Human Rights Commission be as free as possible to exercise its legislative responsibilities, free from control, restriction, modification or limitation by outside sources and that this independence be achieved through the following characteristics: the appointment of a chair, vice-chair and commissioners of the New Brunswick Human Rights Commission on the parliamentary motion of the Premier and the Leader of the Official Opposition; the conferral of budgetary, staffing, and reporting powers on the Commission; the establishment of a fixed term of office, and a single reappointment; remuneration commensurate with that made to the highest tribunal members within the Province; a restriction on the holding of other public offices by the chair, vice-chair and commissioners; and the creation of accountability by the Commission to the Legislature through the mandatory reporting to the Speaker and the creation of a Standing Committee of the Legislature on Human Rights.

The present arrangement whereby the chair and an indeterminate number of commissioners are appointed for an indeterminate period by the Provincial Cabinet (Lieutenant-Governor in Council) has resulted in the appointment of very good leadership to the Commission.

Notwithstanding this very positive experience, there is a widespread belief that the Commission requires a more independent and rigorous structure to fulfill its present mandate. This was particularly reflected in discussions with all senior Commission staff, and the representatives of several groups and private individuals.

The Atlantic Human Rights Centre, headed by Dr. Abdul Lodhi of Saint Thomas University, has recommended that the Commission's administrative placement "should possibly be moved" as its present inclusion in the Department of Labour gives the impression that the Human Rights Code is limited to employment matters.[6]

A similar sentiment was expressed by Mr. Ronald Perley, the President of the Union of New Brunswick Indians:

> I feel the Human Rights Commission is biased ... How can the commission truly pursue issues which arise against the federal or provincial legislation or policies, how far are they committed to go?[7]

Presently, all Canadian human rights commissions, with the exception of the La Commission des droits de la personne du Québec, are appointed by the Lieutenant-Governor in Council. In Quebec, the commissioners are appointed directly by the National Assembly on a motion of the Premier of Quebec. This procedure is not dissimilar to the means by which the New Brunswick Ombudsman is appointed by the Lieutenant-Governor in Council on the recommendation of the Legislative Assembly.[8] Moreover, the appointment procedures under the Quebec and British Columbia ombudsman legislation provide excellent appointment models. In the former jurisdiction, the appointment of the Quebec Protecteur du Citoyen (Ombudsman) "must be approved by two thirds of the members of the National Assembly".[9] In the latter, "the Legislative Assembly shall not recommend a person to be appointed ombudsman unless a special committee of the Legislative Assembly has unanimously recommended to the Legislative Assembly that the person be appointed".[10]

With respect to the termination of an appointment, other than by the completion of a term of office, the Federal Human Rights Act provides that "each member holds office during good behaviour but may be removed at any time by the Governor in Council on address of the Senate and House of Commons" (s.26(4)). Such a condition is also incorporated in all Canadian provincial ombudsman legislation.

A leading human rights authority has concluded that:

> Without the authority and independence which is provided for in the Quebec and Federal Acts, through appointment during good behaviour and subject only to a removal process involving the legislative body, there is less that full confidence that human rights commissions will enforce their codes as vigourously against their own governments as against the private sector.[11]

RECOMMENDATIONS:

3.5 It is recommended that the Chair and Vice-Chair of the New Brunswick Human Rights Commission be appointed by the Lieutenant-Governor in Council on the legislative motion of the Premier and Leader of the Official Opposition.

3.6 It is recommended that members of the Commission other than the Chair and Vice-Chair be appointed by the Lieutenant-Governor in Council following consultation with groups and individuals interested and/or expert in the field of human rights.

3.7 It is recommended that the Chair, Vice-Chair and any member of the Commission be removable by the Lieutenant-Governor in Council only on address of the Legislative Assembly.

C. A Seven-person Commission

The make-up of the Commission must complement its broad promotional, educational and legal functions and must include representatives of those constituencies that are most affected by the legislation. The Commission's present complement of five includes a good representation of educators and of the multicultural mosaic of New Brunswick. Notably absent are community representatives of New Brunswick's visible minorities, private business, labour and the legal profession. The acceptance of the proposition that such appointments are vital to the promotion of equality of opportunity through a New Brunswick Charter leads to the conclusion that the Commission ought to comprise a chair, a vice-chair who would act in the absence of the chair, and a larger number of commissioners.

Such a view is shared by the conclusions and recommendations contained in a 'Human Rights Evaluation' prepared by the Department of Labour in September, 1989. This Study concluded that:

> The effectiveness and efficiency of the Human Rights Commission is limited by the lack of representativeness (in terms of geographic distribution, age, structure and life experience of the New Brunswick population), the terms of appointment and the nature and extent of orientation and training given both prior to commencement of duties and on an ongoing basis.[12]

Further , the Department recommended that:

> more rigorous criteria be developed and implemented to ensure appointments to the Human Rights Commission produce a body committed to the principles of human rights and competent to make fair and wise decisions in discharging its duties under the Act, and ..., that comprehensive training for Commission Members be provided both upon appointment and on an ongoing basis as required.[13]

It appears that the desire to have a Commission that represents a broad community of interests must be balanced by the need for an efficient and well co-ordinated - wieldy -management group. It has been suggested that such a balance would be found in a New Brunswick Commission that comprises "a Chairman, a Vice-Chairman and five or seven Commissioners".[14]

As set out in the following table, the size of Canadian human rights agencies ranges from three to 13 members.

Table 3B - Size of the Commission

Fed.	s.26(1) & (2)	(1) Consisting of a Chief Commissioner, a Deputy Chief Commissioner, and not less than three or more than six other members. (2) These regular members may be full-time or part-time.
Alta.	s.14(1)	Shall consist of the number of members appointed by the Lieutenant-Governor in Council (no numerical guide).
B.C.	s.10(1)	Consisting of not more than five members.
Man.	s.2(2)	Shall consist of 13 members.
Nfld.	s.17(3)	Shall be composed of three or more members.
N.S.	s.16(2)	Shall consist of three or more members.
Ont.	s.26(1)	Being not fewer than seven.
P.E.I.	s.16(2)	Shall consist of three members.
Que.	s.58	Shall be composed of at least seven members.
Sask.	s.21(3)	Not less than three members.
Yukon	s.16(1)	Shall consist of a minimum of three and a maximum of five members.

Recommendations:

3.8 It is recommended that the New Brunswick Human Rights Commission comprise a Chair, Vice-Chair and five Commissioners.

3.9 It is recommended that the membership of the Commission be drawn from backgrounds that complement its promotional, educational and compliance functions, including educators, racial and other visible minorities, private business, labour, and the legal and other professions.

D) A Community-based Commission

One of most difficult practical questions raised by this task is the type of internal structure that would best meet the objectives of the New Brunswick Human Rights Code. This question may be resubmitted in the form of options, including:

1) a part-time Commission comprised of a chair, vice-chair and commissioners and a full-time executive director, superimposed on the existing (though enlarged) staff structure; or

2) a smaller Commission comprised of a full-time chair, part-time vice-chairman and commissioners charged with the administration of the existing (though enlarged) staff structure.[15]

The first of these options appears to be the more appropriate on a number of bases. These include:

a) a perceived desire to enlist as the chair, vice-chair and commissioners individuals whose primary focus is in the private, rather than the public sphere;

b) the decision made by the Province of New Brunswick coincidental with the commencement of this inquiry to appoint a part-time chair and four part-time commissioners to the Commission for a term of three years each;

c) a practice by the present administration to make part-time, rather that full-time, administrative tribunal appointments;

d) a consensus that it is desirable to have one chief administrative officer of the Commission in preference to the roughly co-equal directorships that presently exist.

RECOMMENDATION:

3.10 It is recommended that the Chair, Vice-Chair and Commissioners of the New Brunswick Human Rights Commission be part-time appointees.

E) Fixed Terms of Appointment and Reappointment

New Brunswick's open-ended procedure with respect to terms of office and numbers of reappointments do not reflect well on the seriousness of purpose which commissioners are expected to embrace from the day of their appointment. A fixed term of appointment and a fixed number of reappointments give a clear public message that appointees have a mandate and that there is a sense of urgency in its fulfillment. Such a view finds support in half of the Canadian statutes, including all of the most recent statutory revisions. As indicated in the attached table, terms of three or five years are prescribed, combined with liberal reappointment provisions.

Table 3C - Term of the Commission

Fed.	s.26(3), (5)	Full-time members for up to seven years; part-time members up to three years; may be reappointed
Man.	s.2(4)	for three years from date of being appointed and thereafter until re-appointed or replaced
Nfld.	s.17(5) s.17(6)	for a term of five years... and may be reappointed provides for staggering
N.S.	s.16(3)	for the term prescribed in his appointment and is eligible for reappointment
P.E.I.	s.16(3)	for a term not exceeding three years prescribed in his appointment and is eligible for reappointment, but terms of office of commissioners shall be staggered
Que.	s.58	the members of the Commission shall be appointed for a term ... not exceeding ten years
Sask.	s.21(5)	for a term of five years... and may be reappointed for further terms of five years

Yukon	s.16(1)	for a term of three years.

Based on this experience, a proposed legislative model might include short fixed terms (e.g., three or five years) with a reappointment provision or a longer single fixed term (e.g., seven years). In either case, a "staggering" provision such as that found in subsection 2(4) of the Manitoba Act is essential - particularly if a short fixed-term of appointment is adopted.

It would seem wise to limit the term of office for all members of the Commission. For example, it has been suggested that:

> the Chairman should serve a three-year term, which would be renewable for one further term of office (six years in total). The same would apply to the vice-chairman and commissioners.[16]

Mr. Reg Paul has suggested that "it may be wise to also include a section limiting the appointment period of all members of the Human Rights Commission"[17]

RECOMMENDATION:

3.11 It is recommended that the Chair, Vice-Chair and commissioners of the New Brunswick Human Rights Commission be appointed on a staggered basis for a fixed term (three or five years) and be eligible for a single reappointment.

F) Reasonable Remuneration

Section 10(5) of the New Brunswick Code states that "the Lieutenant-Governor in Council may fix the remuneration of the members of the Commission". As the following table points out, all Canadian legislation is similar to this provision.

Table 3D - Remuneration of the Commission

Fed., s.30	The Governor in Council fixes the salary of the fulltime CHRC members; The Commission, by by-law, fixes the remuneration of part-time members and the travel and living expenses.

N.B., s.10(5) (also B.C., s.10(3); Nfld., s.17(8); Ont., s.26(4); P.E.I., s.16(4); Sask., s.21(8))	The Lieutenant-Governor in Council may fix the remuneration and allowance for expenses of the Chairman, [vice-chairman] members of the Commission.
N.S., s.16(4)	Elaborates on expenses, i.e., "remuneration... in addition to his actual and reasonable travelling and living expenses when absent from his place of residence in connection with the work of the Commission".
Que., s.59	Adds "their salary and term of office, once determined, should not be reduced".

While this type of provision is not objectionable, concern is expressed with respect to the New Brunswick experience whereby the remuneration of the Chair and commissioners has remained at an unacceptably low level. For example, the Chair earns a retainer of $18,000 per year,[18] approximately $8,250 less than his counterpart on the Industrial Relations Board.[19] The Chair and Vice-Chair of the Public Service Labour Relations Board earns $400/day and $175/day respectively.[20] Similarly, the maximum allowance paid to a part-time Commissioner is $75 per day,[21] whereas, members of boards such as the Public Service Labour Relations Board and the Minimum Wage Board earn $100/day.[22]

In order to reinforce the primacy afforded to the protection of human rights in our Province, the remuneration made to the New Brunswick Human Rights Commission should not be less than the maximum paid to other New Brunswick tribunal members.

RECOMMENDATIONS:

3.12 It is recommended that the remuneration paid to the Chair, Vice-Chair and Commissioners of the New Brunswick Human Rights Commission be set at a reasonable level: Chair - minimum $26,250; Vice-Chair - minimum $175/day; Commissioners - minimum $100/day).

3.13 It is recommended that the methodology for remuneration of the Commission be reviewed and that a more equitable and rational system be instituted.

G) Independent Staffing, Budget and Contractual Powers

Central to a notion of independence is financial independence, hiring power and the power to make agreements. Generally, Canadian human rights statutes are silent on the financial and contractual powers of human rights commissions. On the basis of the responses received to the 'Human Rights Questionnaire'[23], it is concluded that such powers are generally assumed by the department whose minister is responsible for the activities of the Commission. This would appear to be particularly the case in New Brunswick. In 1987, the position of Executive Director was abolished and the incumbent transferred to the Department of Labour. The Executive Director's duties were divided between two directors - the Director of Compliance and the Director of Education and Development - who are administratively responsible to an Executive Director within the Department of Labour.

The New Brunswick and other Commissions jealously guard the independence of their compliance and educational functions. This is true even in B.C., where non-Council staff - 48 Industrial Relations Officers employed by the Department of Labour - carry out the compliance function. It does appear that the heavy administrative reliance on the "Minister responsible" casts a rather large shadow on such a perspective.

The recommendation that a more independent human rights commission be established subsumes broader budgetary, employment and contractual powers in such a body. A Commission is foreseen that: a) is financed through a central government or legislative allocation of funds, b) hires its own staff, including a full-time executive director, and c) makes contractual arrangements with other governmental authorities and the private sector: e.g., the Department of Labour or the Department of Finance, for payroll and expense account matters; the Department of Justice or the Department of Labour, for regional office space; universities, for research; and other Commissions or private groups, for staff training.

RECOMMENDATIONS:

3.14 **It is recommended that the New Brunswick Human Rights Commission be granted the authority to be self-administering with respect to staffing, budget and contractual functions. [This recommendation contemplates the conferral of corporate status on the Commission.]**

3.15 It is further recommended that the New Brunswick Human Rights Commission make the necessary arrangements with public and private authorities to ensure that its staffing, budget and contractual powers are exercised consistent with the attainment of independence and economy.

H) Clear Conflict of Interest Provisions

It is most desirable that members of the Commission be drawn from a broad spectrum of life experiences. Given the mandate proposed for the Commission, Commissioners drawn from visible minorities, the multicultural mosaic, business and labour groups, as well as education and legal and/or other professions are envisaged. It is essential for the credibility of the Human Rights Commission that its membership include those whose social or other group has sought or may conceivably seek the protection of the Code. The only restriction on this liberal "conflict" proposition is that public servants other than educators should probably not be appointed as commissioners. This is particularly important if, as recommended, a number of authorities have specific duties conferred upon them under the legislation. The Commission's employees should likewise be the subject of close scrutiny with respect to any remunerative activities outside of their employment with the Commission. Finally, individual commissioners should be statutorily required to declare a conflict and abstain from any proceedings where they have a direct interest. Such an objective might be met by the inclusion of a provision analogous to that which applies to municipal councillors under sections 90.1 - 90.91 of the Municipalities Act.[24]

RECOMMENDATION:

3.16 It is recommended that the New Brunswick Charter provide that the independence conferred upon the New Brunswick Human Rights Commission be complemented by the imposition of conflict of interest provisions with respect to the financial and other interests of the members and staff of the Commission.

I. The Power to Delegate Authority

Only the British Columbia statute contains an explicit delegation of authority provision, one modelled on that contained in all Canadian ombudsman legislation. By a 1989 amendment, the Chair of the B.C. Council of Human Rights may delegate all of his/her authority, except the power to make a report and the power of delegation itself. It is appropriate to include such a provision in legislation which establishes a part-time Commission, including a part-time chair and vice-chair, and a full-time executive director. First, it is essential that the Commission be authorized to create sub-committees to complete a given task and that such sub-committees be comprised of one or more commissioners with the delegated authority to complete that task. Second, it may also be appropriate to provide the Commission with the authority to delegate certain of its powers to the executive director - especially with respect to the disposal of certain complaints. This would be in addition to the conferral of specific statutory functions on the executive director.

RECOMMENDATIONS:

3.17 **It is recommended that the New Brunswick Human Rights Commission be empowered to delegate its administrative authority to members of the Commission - including the Chair, Vice-Chair or any sub-committee established by by-law or regulation.**

3.18 **It is recommended that the New Brunswick Human Rights Commission be empowered to delegate authority to its executive director or other senior directors, but that any decision made pursuant to a delegation of substantive authority shall be the subject of a full right of appeal to the Commission.**

J) The Power to Report

The practice of the New Brunswick Human Rights Commission has been to incorporate its annual report in that of the Department of Labour. While this step is defensible on the basis of the Commission's scant publishing budget and its decision to devote such resources elsewhere, it does little to promote the idea that the Commission functions as an independent body free from direct governmental control.

One reason why New Brunswick may have adopted this approach is the absence of any express statutory requirement that an annual report be prepared and submitted by the Commission. As noted in the Table below, the legislatures of six Canadian jurisdictions make such a provision, including the very explicit and detailed requirements contained in the Saskatchewan statute. Perhaps most significantly, the legislatures of Quebec and the Yukon require that the Commission shall submit the annual report directly to the President of the National Assembly and the Speaker of the Legislature, respectively.

Table 3E - Annual Report of the Commission

Fed.	s.61	CHRC transmits annual report to the Minister of Justice.
N.B.	---	
Alta.	s.18	AHRC submits annual report to Minister who tables it in Legislative Assembly.
B.C.	---	
Man.	s.6(2)	MHRC submits annual report to Minister who 'forthwith' tables it in Legislative Assembly.
Nfld.	---	
N.S.	---	
Ont.	s.30	OHRC submits annual report to Minister who submits it to Lieutenant-Governor in Council. Lieutenant-Governor in Council tables it in Legislature.
P.E.I.	---	
Que.	s.68	CDPQ tables annual report with President of the National Assembly; report published and distributed by Quebec Official Publisher.
Sask.	s.49	SHRC submits annual report to Minister who tables it in Legislative Assembly; Act sets out detailed reporting requirements.
N.W.T.	---	
Yukon	s.17	YHRC submits annual report to Speaker of Assembly.

The reporting issue has been placed in excellent perspective by Professor John McEvoy of Ludlow Hall:

> I wish to bring to your attention the sorry state of the annual report of the Human Rights Commission. As you are aware, the annual report is published as an appendage to the Annual Report of the Department of Labour...
>
> ... This, I suggest, has two negative impacts upon public perception of the Commission. First, public perception of an independent and impartial Commission suffers due to the close association. Second, a negative perception is created that the Commission is a low priority institution of this Province.

> I ask you to consider making the annual report of the Commission meaningful rather than perfunctory. As in other provinces, the report could illustrate the work of the Commission by brief summaries of complaints determined during the year in question. The report could provide greater detail about the work of the Commission and proposals for the future. There is much that could be properly placed in the annual report for the benefit of the public.[25]

RECOMMENDATION:

3.19 It is recommended that the New Brunswick Charter establish a reporting requirement for the New Brunswick Human Rights Commission similar to that of the Quebec and Yukon statutes and that consideration be given to explicit annual report components as set out in the Saskatchewan statute. Such a requirement contemplates that the annual report, in addition to having a public information and promotional value, will serve as a point of departure in relations between the Commission and the Legislature.

3.20 It is recommended that the New Brunswick Charter provide that the New Brunswick Human Rights Commission may make and publish special reports.

V. The Role and Function of the New Brunswick Human Rights Commission

A) The Corporate Commission

The role of the New Brunswick Human Rights Commission is envisaged as one that incorporates the function of promoter, policy-maker, manager and enforcer of a vital philosophical and substantive mandate contained within the proposed New Brunswick Charter of Rights and Freedoms.

The Chair of the Commission has a significant role of overall responsibility for all functions of the Commission and is seen as having a particularly significant liaison role with respect to the Legislature, the governmental authorities charged with responsibilities under the New Brunswick Charter, and the promotion of its universal human rights values.

The role of the respective commissioners will be very much a factor of the gifts they bring to the Commission - their areas of interest and expertise. It is anticipated that, while the Commission should meet together at regular monthly meetings, it should also have the authority to strike committees charged with carrying out specific aspects of its mandate. It is further suggested that such committees might comprise persons other than commissioners, including representatives of the public and private sector.

As recommended by the Commission's Legal Counsel, each member of the Commission and each staff member of the Commission should be required to swear an oath of office or make a solemn affirmation upon commencement of work. A good model for this procedure is found in sections 6(1) and 8(2) of the Ombudsman Act.[26]

RECOMMENDATION:

3.21 It is recommended that the New Brunswick Human Rights Commission be accorded regulation and by-law-making powers in order to meet the objectives of its legislation in an effective, efficient and remedial manner.

3.22 It is recommended that the New Brunswick Charter require that each member of the New Brunswick Human Rights Commission and each staff person of the Commission complete an oath of office or solemn affirmation.

B) The Executive Director, Directors and Staff functions

1) A Larger Staff

The present staffing structure of the New Brunswick Human Rights Commission is inadequate. It is inadequate: a) in terms of numbers - resources spread so thinly that underwork may be a possible option; b) in terms of distribution - directorates with inadequate and ill-defined resources; c) in terms of duplicitous reporting - to the Commission and the Department of Labour; and d) in terms of regional services - one person in a regional office is lamentable in relation to the role of the respective incumbents and the expectations of their clientele.

The Commission requires a larger staff, both central and regional, in order to effectively carry out its compliance mandate, its educational and promotional functions, its broad consultative role with governmental authorities and its communications with other public and private human rights agencies.

2) Executive Director

It is suggested that the function of the New Brunswick Human Rights Commission requires a more traditional management structure than presently exists. As the following table indicates, most Canadian jurisdictions have appointed an executive director, a secretary general, manager or other senior official to carry out such a function. Three jurisdictions, Manitoba, Saskatchewan and the Yukon, have legislatively incorporated the terms of reference of this employee.

Table 3F - Chief Executive Officer of the Commission

Fed.	---	Mr. Maxwell Yalden, Chief Commissioner, is the Chief Executive Officer of the CHRC Mr. John Hucker, Secretary General of CHRC
N.B.	---	Ms. Janet Cullinan, Director of Compliance Ms. Karen Taylor, Director of Education and Development
Alta.	---	Mr.Larry Peron, Acting Executive Director
B.C.	---	Mr. John Joe, full-time Chair Mr. Alan Andison, Manager
Man.	s.7	Ms. Darlene Germscheid, Executive Director - broad powers conferred by statute
Nfld.	---	Ms. Gladys Vivian, Executive Director
N.S.	---	Dr. Bridglal Tachai, Executive Director
Ont.	---	Ms. Catherine Frazee, Chief Commissioner is senior executive officer
P.E.I.	---	Mr. John Wyatt, Executive Director
Que.	---	M. Jacques Lachapelle, President; the President and Vice-President are full-time senior executives of the CDPQ
Sask.	s.22	Mr. Ken Jamont, Director of Human Rights, CEO and Secretary of SHRC

Yukon	s.18	Mr. Dave Porter, Executive Director, responsible for compliance and day-to-day administration of Commission

It is essential that the New Brunswick Charter provide for the appointment of an executive director, who would be conferred with the authority similar to that provided in section 7 of the Manitoba Code:

> 7(1) One of the officers and employees of the Commission shall be designated as executive-director.
>
> 7(2) In addition to discharging his or her other responsibilities under this Code, the executive- director shall
>
> a) act as registrar of complaints received by the Commission and ensure that they are disposed of in accordance with this Code;
>
> b) direct the day-to-day activities of the Commission's staff in the investigation and settlement of complaints, the provision of educational programs, and the other responsibilities of the Commission under this Code; and
>
> c) generally carry out, in accordance with the Commission's policies and directives, the administration of this Code.

3) Other Directorates

A reasonably detailed examination of the role and function of the New Brunswick Commission, including written and oral submissions from its staff and those of eleven other Canadian statutory human rights agencies, has led to the opinion that the function of both existing directorates should be maintained and expanded within the Commission. A fundamental justification for such a step is that, from a strictly legal point of view, the roles of compliance and promotion ought to be executed in a more or less separate fashion. The compliance function is one of dispassionate impartiality; the educational and promotional one, that of a more passionate advocacy. While a small jurisdiction such as New Brunswick must deal with the reality of the combining of functions, the basic structure of the Commission should reflect the idealized situation. A necessary task of the Commission will be to design an administrative model that will best facilitate and coordinate the two functions.

To assist in its completion, reference may be had to the administrative structure of other Canadian Commissions, as set out in the following Table:

Table 3G - Directorates of the Commission

Complaint Procedures	Can.; B.C. (Mgr. of Investigations); Man. (Enforcement); N.S. (Investigations); Ont. (Compliance); Qué. (Contentieux); Sask. (Investigations - Line I).
Special Programs	Can. (Employment and Pay Equity); N.S. (Affirmative Action); Ont. (Systemic Investigations); Que. (Equal Access Programs); Sask. (Affirmative Action and Exemptions - Line II).
Policy and Research	Can. (Policy and Communications); N.S. (Research); Ont. (Policy and Research); Qué. (Research).
Education	Can. (Policy and Communications); Man. (Public Programs); N.S. (Public Education); Ont. (Education and Communications); Qué. (Education); Sask. (Education - Line II).
Communications	Can. (Policy and Communications); Man. (Public Program);Ont. (Education and Communications); Qué. (Communications).
Legal Services	Can.; Ont.; Qué. (Legal Counsel - N.B.; Alta.; Man.; Sask.).
Corporate Services	Can.; B.C. (Office Manager); Man. (Administrative and Support Services); N.S. (Administration and Staffing); Ont. (Finance and Administration); Qué.; Sask. (Support - Line III).
Regional Operations	Can. (Atlantic, Qué., Ont., Prairies, Alta. and N.W.T., Western, National Capital); N.B. (S.J., Moncton, Campbellton); Alta. (Northern and Southern Regional Offices); B.C. (Vancouver); Man. (Brandon, The Pas); N.S. (New Glasgow, Digby, Sydney); Ont. (14 regional offices).
Other	Alta. (senior legal counsel, legal counsel public affairs officer, policy analyst); Nfld. (2 investigation - education officers); P.E.I. (Ex. Director and one secretary); Yukon (one investigative officer and one secretary).

The structure of other Canadian Commissions strongly suggests that additional functions or directorates ought to be considered - in particular, administration and research and policy. A small but efficient administrative component is essential to assist in the wise allocation of scarce resources. It is suggested that such a directorate may address very broad administrative objectives, such as independence and agency accountability. For example, one aspect of such an administrative function has been recommended by the Department of Labour Evaluation, namely:

> that systematic record-keeping practices be introduced to assess demand for Human Rights Commission services and to provide the foundation for future policy making.[27]

A research function once flourished within the Commission and was abandoned only because of fiscal and complaint-driven pressures on resources. The necessity for its revival has been identified in the recent departmental Evaluation, which concluded that:

> while the Commission appears to have effective means of receiving information from the "grassroots", it lacks both research and policy analysis capability and a broad policy-making structure encompassing both education and development and compliance functions. - Its lack of research hampers its ability to provide effective services and in taking a pro-active stance in the human rights arena.[28]

The Evaluation has recommended that:

> a research and policy analysis function and a unifying decision-making structure be established within the Commission with appropriate staff support, to ensure that co-operative and collaborative exchanges take place between the two branches providing a single perspective to guide the Commission in ensuring an orderly and proactive response to the challenges of a changing society.[29]

4) Staff Function

One senses the extent of the Commission's staffing malaise from the total absence of any statutory reference to employees. As the following table attests, other Canadian statutory human rights agencies have received such authority.

Table 3H - Appointment of Commission Staff

Fed.	s.32	Employees of CHRC appointed in accordance with Public Service Employment Act or (per s.32(2)) by contracts for service.
N.B.		None.
Alta.	s.17	Director of the Commission and other employees appointed in accordance with Public Service Act.
B.C.	s.10	Council members are full-time public employees (no mention of other employees).

Man.	s.7(1)	Commission's employment powers reflected by its reference to the Executive-Director as one of the officers and employees of the Commission'.
Nfld.	s.18	Executive Director and other employees 'appointed in the manner established by law' and are members of the Civil Service (remuneration fixed by Lieutenant-Governor in Council per s.18(3)).
N.S.	s.21	...the officers and employees required... may be appointed under the Civil Service Act.
Ont.	s.26(5)	The employees of the Commission shall be appointed under the Public Service Act.
P.E.I.	s.18.1(1)	The Commission may appoint such officers and employees as required... and may determine their functions and remuneration. (The Cabinet may lend staff to the Commission s. 23(4)).
Que.	s.60	The functionaries shall be appointed by the Commission.
Sask.	s.22, 23	Under s.22, the Lieutenant-Governor in Council may appoint a Director of Human Rights who is the Chief Executive Officer of the Commission. Under s.23, the Commission is accorded broad rights to employ officers, clerks or other employees.
Yukon	s.18	The status of the Director of the Commission reflects its employment powers.

The Quebec wording is most straightforward, reflecting the need for independence and accountability.

The New Brunswick Commission's mandate is presently carried out by a central office staff and three one-person regional centres located in Saint John, Moncton and Campbellton. While there is some attraction in centralizing limited resources in a capital city located in the centre of a relatively small geographical area, this is outweighed by the overriding need to have regional staff which is well acquainted with local conditions in an already highly regionalized province, and which is able to respond quickly to concerns that arise in those areas. In recommending the continuation of a regionalized structure, one is particularly cognizant of its potential value in effecting the settlement of urgent complaints before the position of parties become hardened and formal legal proceedings become inevitable. It is assumed that a regionalized structure will utilize electronic "world shrinkers" such as the computer, the toll-free telephone line, the fax and fast mail services to maintain a high level of efficiency and coordination of activity on the part of the Commission's staff.

The departmental Evaluation also concluded that a regional-based service was appropriate. To facilitate the delivery of such a service in an even-handed manner, it recommended that:

> - a toll-free telephone line with appropriate staff support be available to receive calls from throughout the Province, that this service be supported by public awareness initiatives to ensure appropriate utilization and that monitoring of calls be done to permit assessment of the demand for Human Rights Commission services in the Province;[30] and
>
> - periodic Outreach Services be provided in areas of the Province where access has been identified as problematic. This recommendation is made with particular reference to the Native Persons' Desk in consideration of the size of the territory and the inefficient use made of both financial and human resources when short trips are made throughout the Province.[31]

It is noteworthy that both of these recommended actions have been successfully incorporated into the function of the Office of the New Brunswick Ombudsman.[32]

5) Delivery of Human Rights Education and Promotion

If the Commission's public education and promotional functions are to assume the preeminent position envisaged by this Report, it is essential that they be clearly defined both as to design and implementation. In a comprehensive submission to this inquiry, the Commission's Director of Education and Development, Ms. Karen Taylor, described the following as initiatives which fall within the general heading of education:

> Education Programs:
>
> The Education and Development branch recognizes the need to develop effective programs which will heighten awareness and stimulate interest in human rights. A variety of techniques are utilized to achieve this end: workshops, promotional activities, curriculum development and symposia.
>
> Community Development
>
> A well-defined and effective community development program can expand the Commission's services in all geographic areas of the province. This involves creating and maintaining contact with user groups under the Commission's jurisdiction. The goal of the initiative is to develop an increased understanding of their needs and the ways in which this Commission can effectively respond.

> Good Offices
>
> As well as processing approximately 160 formal complaints Commission staff also respond to thousands of informal inquiries. Many of them relate to a human rights concern but are not specifically included in the Act. Staff respond to a variety of inquiries, including Charter of Rights and make appropriate referrals. This informal assistance is given as part of the Commission's long standing policy of "good offices" assistance. This policy has developed in response to a demonstrated need to serve the public well in relation to human rights matters. It also serves to determine the 'status of current human rights issues.
>
> Liaison with Employers
>
> Commission staff are increasingly called upon to provide information regarding the application of the Human Rights Act within the context of employment. The introduction of employment equity and like programmes in the workforce, the impact of the Charter of Rights and Freedoms and the responsibility to respond to a variety of human rights issues have all contributed to a heightened awareness on the part of employers to become informed about equality issues. Commission staff are encouraged to provide assistance and information to all employers on these matters.
>
> Research
>
> The broad scope of the Human Rights Act necessitates an examination of a variety of human rights issues. This requires a well developed approach to human rights research. Unfortunately, the Commission resources in this area at present are seriously inadequate as we do not have a researcher on the plan of establishment.[33]

In its evaluation of this relatively new and ambitious program, the Department of Labour concluded that:

> While education and community development activities have provided commendable service in heightening awareness of and adherence to principles of equality in the Province, it was not possible to systematically measure their effect in terms of i) increasing utilization of Human Rights Commission services, ii) building public awareness and support for human rights principles to be incorporated in the processes and institutions of New Brunswick society or of iii) determining the nature and extent of the role the Human Rights Commission should play in the future.[34]

The Evaluation saw the need for a greater definition and an expansion of this critical function, recommending:

> that a province-wide strategic plan for the public education program component be articulated. The plan would be in sufficient detail to i) identify specific sub-goals

> under the broad mandate of the program, ii) set strategies for achieving sub-goals and specify the outcomes expected from each, iii) outline a system of monitoring and recording outcomes and iv) specify the role of regional Human Rights Officer in the overall plan;[35] and
>
> . . .
>
> that the types of educational initiatives presently provided be augmented by appropriate initiatives targeted to the public as a whole to marshal awareness and general support for respect and protection of equality rights through measures which address systemic discrimination.[36]

It is self-evident that, if the excellent work of the Education and Development Directorate is to meet the expectations posed by the Evaluation, the separation of investigative and educational/promotional functions within an expanded Commission staff is a first step. As long as the two functions are delivered by the same personnel, the immediacy of the former will necessarily take precedence over and dilute the latter function. Such a conclusion presumes that "good offices" functions may more properly fall within the Commission's compliance function. Indeed, "good offices" work will be an essential component of much of the Commission's "intra-jurisdictional" compliance work.

6) Funding

The departmental Evaluation concluded that the Commission's complaint handling function is being completed in a manner comparable to that of other Commissions.[37] No other objective comparative assessment of its functions has been completed, and subjective functions might make this a difficult task.

However, senior Commission staff members argued convincingly that resources are inadequate to meet legislative expectations and that additional funds are required.

A sampling of the observations made by the Commission's Director of Compliance, Ms. Janet Cullinan, attests to this:

> - The additional staff that we believe are necessary but do not have the funding for at the present time are an additional support position in the Fredericton Office and a research and planning officer in the Fredericton Office to gather information, draft publications, speeches, conduct educational seminars, etc.

> - Suggestions have been made that we should publish a separate report which would include much more detail than is provided in that of the Department of Labour. This has been considered and we believe it is a good idea, however funding plays a major role in any decision of this type.
>
> - The major reason there are not more publications that are specific to areas of concern is due to a lack of printing and education funds and we have had to make do with the funds that have been made available to us.[38]

It is quite clear that additional funding must be made available if the New Brunswick Human Rights Commission is to fulfill the role envisaged for it by the New Brunswick Charter.

7) Conclusion

This brief examination of the Commission's staffing function does not purport to be an exhaustive one. On the other hand, it quite emphatically concludes that a traditional management structure, specific directorate and staff functions and an increase in resources are necessary prerequisites to optimal service delivery by the New Brunswick Human Rights Commission.

RECOMMENDATIONS:

3.23 It is recommended that the New Brunswick Charter confer a staffing authority on the New Brunswick Human Rights Commission.

3.24 It is recommended that the New Brunswick Charter provide for the appointment of an executive director of the New Brunswick Human Rights Commission, and set out the responsibilities of this position.

3.25 It is recommended that the New Brunswick Charter provide for the appointment of other directors and staff of the New Brunswick Human Rights Commission.

3.26 It is recommended that the New Brunswick Charter provide that the staff of the Commission be subject to the same general terms and conditions of employment as other public servants.

3.27 It is recommended that the New Brunswick Charter provide that staff of the Commission who are presently members of the civil service be permitted to retain this status.

END NOTES

1. Second Report of Canada on Articles 6 to 9 of the International Covenant on Economic, Social and Cultural Rights, (Ottawa: Department of Secretary of State, December, 1987) p. 31-6.

2. Appendix D-29.

3. New Brunswick Twenty-second Report of the Ombudsman (Fredericton, Queen's Printer; 1989) p. 6-7

4. Appendix H, p. 57. N.B. Department of Labour, Human Rights Evaluation, Fredericton, NB, September, 1989. This work is set out in full as Appendix H to this Report.

5. Ibid. at 59.

6. Appendix D-3.

7. Appendix D-36.

8. R.S.Q., c. P-32, s.2(1).

9. R.S.Q., c. P-32, s.1.

10. R.S.B.C. 1979, c. 306, s.2(2).

11. W. A. Tarnopolsky & W. F. Pentney, Discrimination and the Law (Don Mills: DeBoo, 1985), at 14-2.

12. Appendix H, p. 56.

13. Ibid, p. 58.

14. Appendix D-9.

15. This type of arrangement was recommended by the Federation of N.B. Faculty Associations, Appendix D-11.

16. Ibid.

17. Appendix D-29.

18. N.B., O-C 89-80.

19. N.B., O-C 85-545 (plus $300/day in excess of 4 days work/mo.)

20. N.B., O-C. 85-884.

21. N.B., O-C 80-119.

22. N.B., O-C 80-119; 85-789.

23. The Reports on Canadian Statutory Human Rights Agencies are set out in Appendix E to this Report.

24. R.S.N.B. 1973, c.M-22.

25. Letter, Professor John McEvoy to the Minister of Labour, Hon. Mike McKee, January 31, 1989.

26. R.S.N.B., 1973, c.O-11.

27. Appendix H, p. 59.

28. Ibid., p. 56.

29. Ibid., p. 59.

30. Ibid. at 58.

31. Ibid. at 59.

32. See, for example, the 22nd Annual Report of the Ombudsman, p. 1.

33. Appendix D-35.

34. Appendix H, p. 56.

35. Ibid., at 59.

36. Ibid. at 59.

37. Ibid. at 9.

38. Appendix D-10.

CHAPTER FOUR

The Promotion of Equality of Opportunity through the Prevention of Discrimination

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CHAPTER FOUR

THE PROMOTION OF EQUALITY OF OPPORTUNITY THROUGH THE PREVENTION OF DISCRIMINATION

1. Introduction

This Report draws heavily on international and national models - including the U.N. International Bill of Rights, the Canadian Charter of Rights and Freedoms and the twelve other Canadian human rights enactments - to demonstrate the need in New Brunswick for a remedial approach to the protection of persons and groups from discrimination.

This broad remedial approach, acted upon by an energized Canadian judiciary, requires human rights legislation that is broad in scope, clearly defined and cognizant of the need for such equally clear exceptions as will permit the efficient functioning of our democratic society.

In the preceding chapters, one has endeavoured to demonstrate that New Brunswick human rights law is a complex of international, national and provincial enactments that together create broad legal obligations and which might obtain greater observance through a comprehensive human rights code -the New Brunswick Charter of Rights and Freedoms.

In making this recommendation, one is mindful that consultations with Canadian statutory human rights agencies and other public and private respondents show that the overwhelming preoccupation of these bodies is the complaint investigation of specific proscribed forms of discrimination within specified areas of human activity. The discussion which follows endeavours to show the continuing rationale for retaining the forms of discrimination presently proscribed under the New Brunswick Human Rights Code and the basis for their more comprehensive definition and extension.

This Chapter also envisages the creative use of anti-discrimination provisions, particularly those bearing on race and language, as a means to promote a personal belief in equality and responsibility to one's fellow human that transcends the legal obligations created by positive law.

II. Providing Definition to Equality and Discrimination

The concepts of "equality" and "discrimination" are probably the most important in the New Brunswick Human Rights lexicon. Accordingly, one is initially puzzled by the absence of definitions of either term in the Human Rights Code. The Code does recognize as a "fundamental principle that all persons are equal in dignity and human rights without regard to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status or sex is a governing principle sanctioned by the laws of New Brunswick". Unfortunately, as Mr. Justice MacIntyre pointed out in the Andrews case, "the concept of equality ... is an elusive concept"[1] and one that "lacks precise definition". Quoting John H. Shaar, His Lordship pointed out that:

> Equality is a protean word. It is one of those political symbols - liberty and fraternity are others - into which men have poured the deepest urgings of their heart. Every strongly held theory or conception of equality is at once a psychology, an ethic, a theory of social relations, and a vision of the good society.
>
> It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others and the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in an inequality and, as well, that identical treatment may frequently produce serious inequality.[2]

Although it is obviously trite to define equality as "freedom from discrimination", it is accurate to conclude that this is the manner in which "equality in dignity and human rights" has been interpreted by our Canadian statutory human rights agencies. For example, the Ontario Code defines "equal" to mean "subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination".

It is considerably less defensible that the New Brunswick Human Rights Code lacks a reasonably precise definition of discrimination.

The Supreme Court of Canada has, in the Andrews case, provided a comprehensive definition of discrimination, one which provides guidance for the inclusion of such a definition in the New Brunswick Charter. As Mr. Justice MacIntyre said:

> I would say then that discrimination may be described as a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or

> disadvantages on such individuals or group not imposed upon others or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[3]

Elaborating on this definition, he opined that "distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merit and capacities will rarely be so classed."[4]

Among the important characteristics of this definition are:

a) it focuses on the discriminatory effect rather than intention. "It was held ... that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provisions upon the person affected which is decisive in considering any complaint";[5]

b) this definition protects the individual or group from the imposition of burdens for particular kinds of reasons, such as a denial of the essential worth and dignity of the class against whom the law is directed or a denial based upon unwarranted stereotypes about the capacities and roles of the members of that class;[6] and

c) the definition of discrimination contained in s.15 of the Charter and the analogous provision in section 9 of the Manitoba Human Rights Code -like the pre-1984 British Columbia Human Rights Code - create a general protection from discrimination in addition to proscribing discrimination under enumerated headings. As Mr. Justice MacIntyre pointed out:

> The enumerated grounds ... are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition. The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practiced bases of discrimination and must ... receive particular attention.[7]

For, as Madam Justice Wilson pointed out in the same decision:

> While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain

> groups and individuals by denying them the rights freely accorded to others. I believe also that it is important to know that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. For example, Stone, J. writing in 1938, was concerned with religious, national and racial minorities. In enumerating the specific grounds in s.15, the framers of the Charter embraced these concerns in 1982, but also addressed themselves to the difficulties experienced by the disadvantaged on the grounds of ethnic origin, colour, sex, age and physical and mental disability. It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s.15 that it be interpreted with sufficient flexibility to ensure the "unremitting protection" of equality rights in the years to come.[8]

One concludes that these observations are pertinent to the design of an anti-discrimination model within the New Brunswick Charter.

This judicial definition of discrimination finds legislative expression in section 9 of the Manitoba Human Rights Code:

> 9(1) In this Code, "discrimination" means:
>
> > a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
> >
> > b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
> >
> > c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
> >
> > d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).
>
> 9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are
>
> > (a) ancestry, including colour and perceived race;
> >
> > (b) nationality or national origin;
> >
> > (c) ethnic background or origin;

> (d) religion or creed, or religious belief, religious association or religious activity;
>
> (e) age;
>
> (f) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
>
> (g) gender-determined characteristics or circumstances other than those included in clause (f);
>
> (h) sexual orientation;
>
> (i) marital or family status;
>
> (j) source of income;
> (k) political belief, political association or political activity;
>
> (l) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.
>
> 9(3) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of the form that the act or omission takes and regardless of whether the person responsible for the act or omission intended to discriminate.
>
> 9(4) For the purpose of dealing with any case of alleged discrimination under this Code, no characteristics referred to in subsection (2) shall be interpreted to extend to any conduct prohibited by the Criminal Code of Canada.
>
> 9(5) Nothing in this Code shall be interpreted as condoning or condemning any beliefs, values, or lifestyles based upon any characteristics referred to in subsection (2).

The Quebec Charter, drawing on the European Human Rights Convention, provides the following (somewhat inverted) definition:

> 10 Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists were such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

The Federation of New Brunswick Faculty Associations has strongly "recommended that discrimination be defined as it appears in the Manitoba Human Rights Code".[9]

RECOMMENDATIONS:

4.1 It is recommended that the New Brunswick Charter provide for a general protection from discrimination analogous to that found in section 15 of the Canadian Charter of Rights and Freedoms and as set out in section 9 of the Manitoba Human Rights Code.

4.2 It is recommended that the New Brunswick Charter incorporate a definition of discrimination similar to that found in section 9 of the Manitoba Human Rights Code.

III. Fields of Activity Addressed by the New Brunswick Charter

The New Brunswick Code presently makes it unlawful to discriminate against any person in respect of:

a) employment, including hiring, firing, promotions, terms and conditions of employment, membership in trade unions, application forms, advertisements and job interviews;

b) the rental of a commercial or dwelling unit;

c) the sale of property;

d) the provision of accommodation, services or facilities;

e) the publication or display of any notice, sign, symbol or emblem indicating discrimination; and

f) membership in any professional business or trade association.

For the most part, the fields of activity contained in Canadian human rights legislation are the same.[10] This is because, quite logically, they represent the points of contact where individuals and groups have traditionally been subjected to discrimination. Moreover, the parent legislation of the Human Rights Code was based on widely-adopted Ontario models and drafted in relation to the regulated fields of activity. Thus, the substantive provisions of the 1967 Human Rights Act combined those of the Fair Employment Practices Act and the Fair Accommodation Practices Act, while the 1971 revision added the real estate sale and rental fields - including restrictive covenants - to the list of regulated fields of activity.[11]

The adequacy of the definition of these fields of activity must be measured in relation to judicial interpretation, other Canadian codes, and a desire to meet the dual tests of plainness and comprehensiveness.

In the recent decision by the Court of Appeal of N.B. in the "Ross" case[12], the following principles of interpretation were enunciated:

> a) It is not a sound approach to say that no broader meaning can be given to the Code than the narrowest interpretation of the words employed;[13]
>
> b) the Act must be so interpreted as to advance the broad policy considerations underlying it. [14]

Canadian legislative provisions are fairly consistent in prohibiting discrimination in "most of the basic elements of civilized society".[15] These are set out in the annexed Table 4A and at the end of this chapter.[16]

The addition of "contract" as a field of activity - as is presently the case in Manitoba, Ontario, Prince Edward Island, Quebec and the Yukon - would serve to both clarify and extend the scope of the New Brunswick Charter. As a complementary measure, all contracts should be statutorily deemed to include a provision that prohibits discrimination in any of the contract's terms and renders void or voidable any part or all of a discriminatory contract. Further, consideration should be given to explicitly enabling the provincial government to include 'no discrimination', reasonable accommodation and/or affirmative action provisions in Crown contracts. In this respect, it is noted that the inclusion of 'no discrimination' provisions in Federal government contracts predates the New Brunswick Code.[17]

RECOMMENDATIONS:

4.3 **It is recommended that the New Brunswick Charter incorporate the fields of activity within which discrimination is prohibited in the present New Brunswick Human Rights Code, including the order of presentation in sections 3 to 7, the definitions in section 2 and the provisions in section**

4(3) respecting restrictive covenants. In any re-casting of sections 3 to 7, it is suggested that the terminology contained in the Manitoba Human Rights Code and the Model Human Rights Act* be consulted.

* Alan Andison, A Model Human Rights Act, (Ottawa: Secretary of State, 1985)

4.4 It is recommended that the New Brunswick Charter include 'contract' as a field of activity within which discrimination is prohibited.

4.5 It is recommended that the New Brunswick Charter provide that all contracts be deemed to include a clause prohibiting discrimination (as in Manitoba Code, section 56; Ontario Code, section 25).

4.6 It is recommended that the New Brunswick Charter and other provincial enactments include a provision to facilitate, through Crown contract, the promotion of human rights protection by the prohibition of discrimination, by the provision of reasonable accommodation and by affirmative action.

4.7 It is recommended that the New Brunswick Charter clarify the specified fields of activity by the addition of comprehensive definitions, including the definition of 'employer', 'employee', 'accommodation, goods, services or facility', 'licence' and 'education facility'.

4.8 It is recommended that consideration be given to the inclusion within the New Brunswick Charter of a specific right to equal treatment with respect to the fields of activity covered by the New Brunswick Charter.

IV. Exceptions

A) Introduction

There are presently three types of exceptions or exemptions to the prohibitions against discrimination, including a) specific statutory exceptions; b) reasonable and bona fide requirements (also referred to as b.f.o.q., b.f.q., b.f.r.); and c) special or affirmative action programs. These are set out parenthetically in the annexed Table 4A (page 254) and in the detailed endnotes of this chapter.[18]

In large measure, the specific exceptions contained in human rights legislation and the more general exception for reasonable and bona fide requirements are of the same nature. The difference is more of methodology of legal interpretation, the specific exception being accountable to the principle of 'reasonable accommodation' and to section 15 of the Charter; the 'bona fide requirement' being defined in terms of the subjective-objective test enunciated in the 1982 Supreme Court of Canada decision in Ontario Human Rights Commission v. Borough of Etobicoke.[19]

Special or affirmative action programs receive separate legislative and judicial treatment because they are viewed as integral means to the fulfillment of the promotion of equality and the elimination of discrimination, rather than a rationally necessary exception to the objective of equality of opportunity.

This section is intended to outline the general framework within which exceptions fall. The most critical and specific aspects of this issue are also addressed under the specific grounds of discrimination where they have coalesced.

This discussion necessarily touches on difficult administrative questions facing the New Brunswick Commission, including the desirability of continuing the present bona fide occupational qualification/special program advance application procedure and the related issue of providing definition to the exception-granting process by the enactment of regulations or the formulation of guidelines or advisory opinions.

B) Specific Exceptions

The New Brunswick Human Rights Code presently incorporates the following exceptions to its anti-discrimination mandate:

a) age discrimination based on a bona fide retirement, pension or insurance plan (s. 3(6));

b) discrimination on the basis of disability with respect to work requirements or the terms of a group or employee insurance plan;

c) a 'free speech' exception with respect to the prohibition against discriminatory publications, and

d) discrimination on the basis of British or Canadian citizenship as a requirement of membership in an occupational association.

The following observations regarding these exceptions can be made. First, as regards a) and b), these exceptions are in addition to more general bona fide and reasonable exceptions. Second, as regards c), it may be superfluous unless it is intended merely as an indication to the Human Rights Commission that it is necessary to balance the importance and the seriousness of the communication against its effect on discrimination concerning those groups protected by the legislation.[20] Third, as regards d), if it were challenged judicially, it would probably be found to be of no force and effect given the Supreme Court of Canada decision in Andrews v. Law Society of British Columbia.[21]

In the broader Canadian context, there are the following additional exceptions:

- benefit plans generally (Man., s. 14(c));
- criminal charge (conviction/record) relevant to employment (B.C., s. 8, 9; Que., s. 18.2; Yukon, s. 9(b));
- pre-employment inquiries and documentation; private residential employment (Alta., s. 9; Man., s. 14(8); Nfld., s. 10(6), 11(1); N.S., s. 8(4); N.W.T., s. 13(1); Yukon, s. 10(3)(a));
- nepotism - employment of spouse, child or parent of employer or employee (Ont., s. 23);
- private residential occupancy (Man., s. 16(2); N.S., s. 5(2), s. 11D(2); Que., s. 14; Yukon, s. 10(3)(b));
- age, sex, disability and marital status discrimination in employment, occupancy and the provision of goods, accommodations, services and facilities, and the functions of non-profit ethnic, religious, charitable, educational, social, cultural, philanthropic or political institutions and organizations.[22]

The peculiar legal status of many of these exceptions and the variety of often clumsy terminology employed to effect them lead one to a preliminary conclusion that specific exceptions are inappropriate and ought to be properly subsumed within a "bona fide and reasonable" test applicable to all fields of activity and grounds of discrimination.

However, such an opinion must be considered in the light of advice such as that given by one of the New Brunswick Commission's senior human rights officer that, to reduce the burden of exemption applications and complaints, it would be prudent to recognize expressly as exemptions those situations where the Commission would normally grant an exemption.[23]

It is suggested that, while such an administrative objective must be met, there may be a legislative methodology that is superior to the "pigeonholing" of specific exceptions in the New Brunswick Code. It is that the Lieutenant-Governor in Council - by regulation - or the New Brunswick Human Rights Commission - by regulation, guideline or advisory opinion - establish criteria for the creation of exceptions. Such a procedure, which presently obtains under the Federal Act,[24] balances certainty and flexibility in a legislative format, and is also accountable to independent scrutiny.

C) Bona Fide and Reasonable Qualifications or Requirements

In Brossard v. Québec (Commission des droits de la personne)[25] the Supreme Court of Canada confirmed that:

> It has been decided by this court in Ontario Human Rights Commission v. Borough of Etobicoke, and reaffirmed in Bhinder v. Canadian National Railway Co., that bona fide occupational qualification exceptions in human rights legislation should, in principle, be interpreted restrictively since they take away rights which otherwise benefit from a liberal interpretation.[26]

The Etobicoke[27] case is considered definitive of the criteria that must be met to establish the legality of "exceptions" under human rights legislation. These criteria are concisely set out in Mr. Justice McIntyre's decision as follows:

> To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.[28]

In the subsequent Supreme Court of Canada decision in Bhinder v. Canadian National Railway Co.[29], the Court emphatically declared that, once a bona fide exception to non-discrimination is established, there is no duty to "reasonably accommodate" any special case, as there would be if no such bona fide requirement was established. In a finding that would be applicable to all fields of activity subject to a bona fide and reasonable exception, Mr. Justice McIntyre stated that:

> ... a condition of employment does not lose its character as a bona fide occupational requirement because it may be discriminatory. Rather, if a working condition is established as a bona fide occupational requirement, the consequential discrimination, if any, is permitted.... To apply a bona fide occupational requirement to each individual with varying results, depending on individual differences, is to rob it of its character as an occupational requirement and to render meaningless [its] clear provisions.[30]

Mr. Justice McIntyre confirmed and expanded upon the Bhinder decision in the course of his more recent judgement in Andrews:

> It should be noted as well that when the Human Rights Acts create exemptions or defences, such as a bona fide occupational requirement, an exception for religious or political organizations, or definitional limit on age discrimination, these generally have the effect of completely removing the conduct complained of from the reach of the Act.... Where discrimination is forbidden in the Human Rights Acts it is done in absolute terms, and where a defence or exception is allowed it, too, speaks in absolute terms and the discrimination is excused. There is, in this sense, no middle ground.[31]

On the same day that the Bhinder decision was handed down, the Court issued its ruling in Ontario Human Rights Commission v. Simpson-Sears.[32] The court held that where discrimination, including adverse effect discrimination, is shown, and the discriminatory practice is related to job performance, the employer is required to show that such reasonable steps toward accommodation of the employee's position have been taken as are open to the employer without undue hardship.[33]

The difficult task of rationalizing the decisions in O'Malley and Bhinder has found expression in the following provision in section 12 of the Manitoba Code:

> [T]he right to discriminate where bona fide and reasonable cause exists for the discrimination, or where the discrimination is based upon bona fide and reasonable requirements or qualifications, does not extend to the failure to make reasonable accommodation....

The incorporation of such a provision in the New Brunswick Charter contemplates a general bona fide and reasonable exclusionary clause which underlines the point that occupational requirements may be amenable to reasonable accommodation provided that they do not lead to any significant dislocation of an existing business or other function.

D) Special or Affirmative Action Programs

Section 13(1) of the New Brunswick Code provides that "the Commission may approve a program to be undertaken ... to promote the welfare of any class of persons".

Section 15(2) of the Canadian Charter provides that section 15(1), the equality provision:

> ... does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The purpose of such constitutionally sanctioned programs is to counter the adverse effects of systemic discrimination. Systemic discrimination has been defined by the Supreme Court of Canada in the Action Travail des Femmes[34] case as follows:

> [S]ystemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural forces", for example, that women "just can't do the job". To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.[35]

The Government of Canada in the Employment Equity Act[36] and the Province of New Brunswick in the Pay Equity Act[37] and in other initiatives have sought to combat systemic discrimination through special programs. Such programs advance the principle of equality of opportunity, and it is appropriate that the constitutionally enshrined principle that underlies them should be continued in the New Brunswick Charter.

E) The Commission's Role with Respect to Exceptions

A discriminatory qualification or requirement, or a special program is illegal under the Human Rights Code unless the Commission has made an advance ruling that such qualification or requirement is bona fide or the proposed special program is appropriate. Elsewhere, the Federal Commission (s.27(2)-(4)) and the Manitoba Commission (s.21) may issue guidelines and advisory opinions determinative of the legality of a proposed action. However, these two jurisdictions and all others in Canada follow a procedure of complaint-driven rulings with respect to exceptions, i.e., by Commission investigation or a board of inquiry.

There are conflicting views on the efficacy of the New Brunswick legislative regime. The persons most directly responsible for its administration, Ms. Karen Taylor and Mr. Martin Mockler, believe the New Brunswick procedure is workable. Ms. Taylor, the Commission's Director of Education and Development, states that:

> Although I understand that New Brunswick is the only province that approves B.F.O.Q.'s, I do not think that the present system in New Brunswick is unreasonable. It forces employers who may not otherwise do so, to examine the genuine qualifications that are necessary for a job. If that requirement is removed and the B.F.Q. is used as a defence only, it then means, generally, that an unrealistic or discriminatory qualification will proceed until a complaint is filed. It places the burden of complaining on the person who is being discriminated against.
>
> Investigating B.F.O.Q.'s/B.F.Q.'s is not particularly burdensome from an administrative standpoint. It has educational benefits as well, since employers often seek additional consultative services regarding policy development or guidance in the employment process, from the branch.[38]

Moreover, in comparing the existing procedure with that found in Manitoba and the Federal sphere, Mr. Mockler has opined that:

> To change the exemption process presently in place in New Brunswick to one of the advisory opinions similar to Manitoba would place less credibility on the Commission opinions since the advice given is an opinion not a decision as is the case now.
>
> An exemption grants permission for someone to operate outside of the Human Right Act whereas an advisory opinion could place the applicant in financial and legal jeopardy if after taking action on the Commission opinion a court ruled the Commission opinion was not legal or binding.[39]

Whether or not there are large practical differences between the present New Brunswick exemption process, and that afforded by one which includes the issuance of guidelines or advisory opinions, the point is well-taken that there is merit in the formal resolution of such difficult questions in a non-adversarial setting.

On the other hand, there are those who believe that the New Brunswick approach is administratively burdensome and arbitrary in scope. Mr. Gordon Petrie, Q.C., an experienced labour law practitioner, has asserted that:

> The major problem with the current Code is the provision which mandates that the Commission determines the existence of a "bfoq". This should be a matter, as elsewhere in the country, for a board of inquiry to determine after a full and fair hearing.[40]

A middle ground - combining both the exemption application and complaint-driven models - has been suggested by the Commission's senior Human Rights Officer, Mr. Francis Young:

> To reduce the number of exemption requests that need to be considered by the Commission, the Director of Compliance should have the authority to grant exemptions, as is now the practice in Saskatchewan.
>
> The number of exemption requests that need to be considered by the Commission could be further reduced by giving it the jurisdiction to dismiss a complaint entirely (retroactively) if it determines that it would have granted an exemption justifying the conduct complained of, had such an exemption been sought in advance. It would thus no longer be necessary for an employer, landlord, or service provider to apply in advance for an exemption, provided it was confident that it could obtain an exemption once a complaint was filed.[41]

It seems to be inferred that such administrative efficiencies could enable the Commission to have better control over the exemption "agenda" so as to be able to respond to public demand while also developing comprehensive policy with respect to its overall exemption-granting function. Resort to a variety of legislative mechanisms could achieve such a goal.

As a pre-eminent example, one notes that with respect to group or employee insurance plans, the protection against discrimination on the basis of age or disability does not pertain if the plan is 'bona fide' (per s. 3(6) and 3(7)). Moreover, individual insurance coverage with respect to a prohibited ground must follow the exemption approval process. It has been pointed out that:

> At the present time, persons with even minor disabilities and illnesses are routinely denied individual insurance entirely, even though the Code prohibits this practice unless an exemption has been granted.[42]

The Commission's Legal Counsel has suggested that the whole area of insurance company exceptions be more closely regulated.[43]

The suggested approaches to address this issue include: a) the promulgation of regulations that would help determine when age, sex and/or disability discrimination is justifiable; b) the retention of the present exemption process supplemented by the conferral of a complaint initiative function in the Commission, and c) the conferral of greater latitude on the Commission or a board of inquiry, where a discriminatory practice is ultimately found to be a bona fide requirement or qualification (such latitude to be balanced by the conferral of costs and other financial powers to meet an intentional and individious contravention).

In order to better address the difficult public issues raised by exceptions, the projected Commission by-laws might enable the striking of a Commission sub-committee, comprising one Commissioner, Commission staff persons and experts in the scrutinized field of activity, to develop 'bfq' policy and regulations. To use the benefits example, a Commission sub-committee comprising one Commissioner, Commission staff and representatives of the insurance industry, as well as the Superintendents of Pensions and Insurance, might be struck to develop the criteria for granting exemptions. The procedure would lead to complementary regulations under the Human Rights Act, the Insurance Act and the Pension Benefits Act.

It is suggested that such mechanisms would address all aspects of the exemption process, including special programs, and provide a model for addressing other types of policy issues faced by the Commission.

RECOMMENDATIONS:

4.9 **It is recommended that the New Brunswick Charter confer on the New Brunswick Human Rights Commission the right to approve all requests for exceptions under the statute, such power to include the conferral of a discretion in the Commission to issue an advisory opinion or guideline in an appropriate instance.**

4.10 **It is recommended that exceptions with respect to discriminatory practices be permitted with respect to a 'bona fide and reasonable requirement' or**

for 'bona fide and reasonable cause' (as in the Manitoba Code, s. 13(1), 14(4), 14(6), 15(1), 16(1) and 18).

4.11 It is recommended that the specific exemptions presently found in the New Brunswick Human Rights Code be omitted from the New Brunswick Charter.

4.12 It is recommended that the regulation - making power under the New Brunswick Charter enable the Lieutenant-Governor in Council, on the recommendation of the Commission, to formulate regulations with respect to exceptions. This regulation-making authority should define the terminology and criteria applicable to the determination of whether a qualification, requirement, limitation, specification, exclusion, denial, preference or differentiation is 'bona fide' and reasonable. Such regulations would be made with respect to the fields of activity under the Code, including:

- age, sex, disability and marital status discrimination in employment, occupancy and the provision of goods, accommodation, services and facilities;
- pension, insurance and other benefit plans;
- citizenship and other legal status under the Immigration Act (Canada);
- criminal charge/conviction/record relevant to employment;
- pre-employment inquiries and documentation in private residential employment;
- nepotism (employment of spouse, child or parent of employer or employee);
- private residential occupancy;
- functions, including composition, employment and publications of (non-profit) ethnic, religious, charitable, educational, social, cultural, philanthropic, political or educational institutions and organizations, including volunteer associations.

4.13 It is recommended that one or more Commission committees be struck - with power to add persons other than Commission members - in order to obtain the most effective exemption regulations.

4.14 It is recommended that an exemption regulation under the New Brunswick Charter provide for the delegation of the approval procedure to the executive director of the Commission.

4.15 It is recommended that, notwithstanding the requirement that an application for exemption be made in all cases, the Commission or a board of inquiry be vested with remedial authority to grant an exemption following the making of a complaint.

V. Grounds of Proscribed Discrimination

A) Introduction

It is essential that legislation the primary goal of which is educational or promotional and the enforcement of which is essentially extra-judicial should enunciate most clearly the types of proscribed activities that "epitomize the worst effects of the denial of equality."[44] Such enumerated grounds do, in the words of Mr. Justice McIntyre, "reflect the most common and probably the most socially destructive and historically practiced bases of discrimination and must ... receive particular attention."[45]

The discussion which follows endeavours to demonstrate that there is a sound legal and administrative basis for retaining the grounds (or heads) of proscribed discrimination in the New Brunswick Human Rights Code and for considering the extension of the Act to include impugned grounds that exist in other Canadian human rights legislation.

The discussion of this vital component of the legislative scheme comprises an examination of each of the grounds of discrimination included in our Canadian legislation. The annexed tables 4B, 4C and 4D (pages 188, 189, 190) set out a comparison of these grounds of discrimination in graph form.

B) Grounds Presently Addressed by the New Brunswick Code

1) Race, Colour, Ancestry, Origin

New Brunswick's Policy on Multiculturalism declares that:

> Equality for all, notwithstanding racial, ethnic or national origin, is a fundamental precondition to full participation in society. The concept of equality embodies rights and obligations for all men and women. This means a commitment by all to a society where racial and ethnic minorities may live without fear of exploitation or discrimination and to a society where all men and women must expect to contribute and be an active participant in that society.[46]

New Brunswick's first black Human Rights Commissioner, Mr. Fred Hodges, has expressed serious concern with "the transportation of hatreds that exist in the homelands of people of different ethnic groups, bringing these to Canada, sometimes uniting with present old citizens to maintain present status quo, and perpetuating present racist activities and policies."[47]

In January 1989, Dr. Joseph Fletcher of the University of Toronto, released the first results of a Survey of Racial Prejudice.[48] This statistical data reinforces the perception that greater vigilance and much hard work is required if Canadian society is to obtain a public belief in equality of opportunity leading to true equality of respect and dignity to all persons. A sampling of Professor Fletcher's work indicates that:

- 50% of the survey's "citizen sample" believed that "this country would be better off if we worried less about how equal people are".
- 50% of an "elite sample" and over 70% of a "citizen sample" opined that "immigrants often bring discrimination upon themselves by their own personal attitudes and habits".
- About one third of respondents believed that "laws guaranteeing equal job opportunities for blacks and other minorities sometimes go too far".
- Ominously, one quarter believed that "some breeds of people are naturally better than others".
- Between a quarter and a third responded that "the trouble with letting certain minority groups into a nice neighbourhood is that they gradually give it their own atmosphere".
- 30% of a "citizen sample" responded that "when it comes to the things that count most, all races are certainly not equal".

- Nearly a quarter of the "elite sample" and 40% of the "citizen sample" would suggest that "if minority groups hope to be liked better, they should first try to get rid of their harmful and irritating faults".
- 50% of the "elite sample" and 27.8% of a "citizen sample" believed that "if we really give every person an equal chance, almost all of them would turn out to be equally worthwhile".
- 76.2% and 63.6% of the "elite" and "citizen" samples, respectively, responded to the same question that "no matter how we treat everyone, some people will turn out to be better than others".
- On a much more positive note, between 85% and 90% of this same group believed that it was important for them to "make a special effort to protect ethnic and racial minorities".

These survey results seem to mirror the concerns raised by Dr. Wilson Head, an American civil rights leader engaged by the Donald Marshall inquiry. Dr. Head rhetorically asked how we could hope to achieve a belief in and realization of equality in a society premised on the competitive objective of "being Number One".[49]

Professor Fletcher's survey raises serious concerns about the extent to which the objectives of the U.N. International Bill of Rights and the New Brunswick Human Rights Code have been met. One of the important questions that arises from this disconcerting range of negative public feeling concerns the type of legislative scheme that will most effectively address these feelings.

The New Brunswick Human Rights Code presently prohibits discrimination of the basis of "race, colour..., national origin, ancestry, place of origin". Furthermore, section 15 of the Canadian Charter nullifies a statutory enactment which is discriminatory on the basis of "race, national or ethnic origin (and) colour".

"Race" is defined as "an ethnical stock, a great division of mankind having in common certain distinguishing physical peculiarities ...appearing to be derived from a distinct primitive source."[50] This ground is found in section 15 of the Charter and in every provincial and territorial Act. It is a broad definition and of great efficacy.

The proscribed ground of "colour" is also found in each Canadian enactment. Strictly speaking, colour as a head is redundant because colour would be considered a "distinguishing physical peculiarity" subsumed in race. However, since it graphically prohibits the most common form of discrimination -that directed against members of visible minorities - it should surely be included alongside "race".

The third component of this group is "ancestry, origin". Ancestry is defined as "line of descent"[51] and is used as a ground in seven of the relevant acts. However, the distinction between "ancestry" and "origin" is such a fine one that it may also be advisable to employ the latter term since it is broader. Native people of Canada are often subjected to discrimination on the basis of their ethnic origin. Arguably, this could fit under the general head of "race" but New Brunswick may not want to deviate from commonly accepted definitions in use across Canada which assist in standardizing statistical records. Finally, the particular head of national origin would protect those people who were born in countries other than Canada.

The foregoing discussion, and the discussion relating to citizenship and nationality, lead naturally to the question of the relationship between anti-discrimination and multiculturalism.

Multiculturalism is a policy which recognizes and celebrates a state's ethnic, linguistic, religious and racial diversity. Multiculturalism is a human rights concern at international law that is evident in the anti-discrimination clauses of the U.N. International Bill of Rights, and in the Regional Conventions, all of which guarantee the rights set forth in them without discrimination on the basis of race, colour, sex, language and religion. Moreover, the International Covenant on Civil and Political Rights prohibits discrimination on all those grounds as well as on the basis of "political or other opinion, national or social origin, property, birth or other status". It is difficult to think of any cultural group which would be discriminated against without an infringement of at least one of those heads of discrimination.

In Canada, at the constitutional level, section 27 of the Charter states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Part of the ongoing debate concerning section 27 is whether that section, particularly when taken in conjunction with the equality guarantees in section 15, amounts to a substantive recognition of cultural rights, or whether its effect, as an interpretive section, is more limited. Some authors suggest that the combined strength of sections 15(2) and 27 is to place a duty on governments to take positive measures toward the enhancement of cultural minorities, and that the correlation of this duty is the collective right of each cultural minority to have access to such support.[52] Such an interpretation would be consistent with Canada's obligations under the

U.N. International Bill of Rights. While its phrasing suggests that such rights are individual rather than collective, it is arguable that both instruments place a duty upon the Government of New Brunswick to support minority cultures in the Province through positive measures.

The growing commitment to multiculturalism in New Brunswick has been reflected in the formulation of a public Policy on Multiculturalism[93], the redesignation of the Department of Labour as "Labour and Department responsible for Multiculturalism" and most recently, the appointment of the President of the New Brunswick Multicultural Council as Chair of the New Brunswick Human Rights Commission. It is considered appropriate that the New Brunswick Charter should recognize the significant relationship between multiculturalism and human rights. In examining legislative models, one notes three approaches in addition to the grounds of proscribed discrimination: first, the granting of broad exceptions with respect to the function of an institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination (e.g. Ont. s. 17); second, by the approval of special programs, such as those authorized by section 13 of the New Brunswick Code; and third, the legislative approach of the Yukon, which requires that:

> This Act should be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of the residents of the Yukon.

This legislative approach is appealing, particularly if one is also prepared to adopt a concept of multiculturalism as has been suggested in the research paper prepared for this inquiry by Mr. Christian Whalen. Mr. Whalen has concluded that:

> What is needed in New Brunswick is a new commitment to multiculturalism ... Moreover to make that commitment genuine, it must be a policy aimed at minority cultures in the first instance but also at majority cultures. The framework for such a policy should be legislatively enshrined in the new Human Rights Act both in its preamble, or legislative purpose clause and by the means of provisions similar to the International Bill of Rights. Such a policy would serve to protect and promote minority culture in the province.[94]

RECOMMENDATIONS:

4.16 **In order to ensure legislatively the recognition, promotion and protection of our multicultural heritage and to underscore New Brunswick's membership in the world family, it is recommended that the New Brunswick Charter prohibit discrimination on the basis of race, colour, national or**

ethnic origin, place of origin, ancestry and perceived race, colour and ancestry.

4.17 **It is recommended that there be incorporated in the New Brunswick Charter an interpretive provision analogous to that contained in section 27 of the Canadian Charter of Human Rights and Freedoms and section 2 of the Yukon Human Rights Code, namely, that the New Brunswick Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of the residents of New Brunswick.**

2) Religion, Creed

All three enactments applicable to New Brunswick - the Canadian Charter, the Canadian Human Rights Act and the New Brunswick Human Rights Code - prohibit discrimination on the basis of "religion".

This ground is a necessary one. The issue to be decided is which phrasing is most effective and most comprehensive.

Religion, in its broadest sense, includes all forms of belief in the existence of superior beings exercising power over humans by violation, rules of conduct and punishment.[55]

Creed includes any system of religious belief or formula of religious belief; or a statement of belief or opinion on any subject not tied to acceptance by a church.[56]

Like New Brunswick, the Quebec Charter and the B.C. Code list "religion" as a ground. Ontario, Saskatchewan, and the Northwest Territories list only "creed"; both Nova Scotia and Newfoundland list "religion and religious creed"; Saskatchewan defines "creed" as "religious creed". P.E.I. refers to both "religion" and "creed" while Alberta refers to "religious beliefs". Manitoba and the Yukon set out a much more detailed ground: "religion or creed, a religious belief, religious association or religious activity".

The definition of religion itself does not include (religious) "practices, observances or activities". It is the latter three specific items which are usually in issue when discrimination is alleged. Examples of this are refusal to accommodate the work schedule of a person who observes different days of rest or worship, or the refusal to hire someone whose attire does not conform with the work uniform. In such cases, it is not the person's belief system per se which is at issue. On the other hand, it is important to note that the refusal to employ someone who refuses to work on certain days because of religious observance, may well result in a contravention of the human rights statute, even though the action is based on the employee's refusal to conform to a condition or term of work and not religion per se. This is because discrimination is pre-eminently concerned with effect rather than intent.

In summary, the word "creed" is more comprehensive since it alludes to the system that surrounds the belief. Moreover, the addition of the words "practices, observances or activities" would most adequately address the matters that usually arise under this heading.

That religious intolerance remains a serious issue in our apparently pluralistic and humanistic society is reflected in Professor Fletcher's findings. Approximately 40% of the "citizen group" and 30% of the "elite group" in his Survey mainly disagreed with the statement that "children who are non-Christians and non-believers should not be required to listen to prayers in schools".[57]

It is also suggested that the recent Court of Queen's Bench decision in Sonnenburg v. Lang and Le Centre Universitaire Saint-Louis Maillet requires that the prohibition against religion discrimination be stated in most explicit terms.[58]

RECOMMENDATION:

4.18 It is recommended that protection from discrimination on the basis of religion be extended and clarified under the New Brunswick Charter to include "religion or creed, religious belief, religious association or religious practices, observances or activities".

3) Age

a) Introduction

The New Brunswick Human Rights Code and that of every other Canadian jurisdiction prohibit discrimination on the basis of "age". However, these statutes also qualify this prohibition with respect to (1) minimum age, (2) maximum age, (3) bona fide occupational requirement, and

(4) pension or insurance plans. All of these limitations must be defensible since the Charter prohibition on the basis of age is qualified only by a reasonable limit demonstrably justifiable in a free and democratic society.

Many jurisdictions stipulate that people under the age of majority cannot cite "age discrimination" if they do not receive the same privileges as the rest of the population. Similarly, several jurisdictions expressly exclude those over the age of 65 from the protection given to others against age discrimination.

Quebec protects against discrimination on the basis of age "except as provided by law". Newfoundland stipulates that a person is protected against age discrimination only if he or she is between the ages of 19 and 65. The bottom limit is set by the definition section of the province of Ontario, which says that age means "an age that is eighteen years or more". The definition of age in Saskatchewan is "any age of eighteen years or more but less than sixty-five". Manitoba's sections 13(2) and 14(10) stipulate that the bottom limit exists only if the age of majority in the particular matter referred to is authorized by a statute of Manitoba. The federal Act does not protect an individual "who has not reached the minimum age or who has reached the maximum age that applies to that employment by law or under regulations." The Act then goes on to give a more novel definition of the maximum age - the normal age of retirement for employees working in positions similar to the position of that individual. In the Ontario Act, section 14 says: "A right under Part I to non-discrimination because of age is not infringed when an age of 65 or over is a requirement, qualification or consideration for special treatment." Section 15(a) of the federal Act has a similar provision. Also, a similar effect could be guaranteed by all the other provincial 'general bona fide occupational qualification' sections, by reading age into them. Section 10(5) of the Newfoundland Act says that "[t]he provisions of subsections as to age shall not apply to termination of employment because of the terms or conditions of a bona fide retirement or pension plan or insurance plan." Manitoba's section 15(2) and P.E.I.'s section 11 have similar import. The British Columbia statute has defined age as "an age of 45 years or more and less than 65 years". However, since the provision was held to be invalid by the B.C. Court of Appeal in the Harrison[59] and Stoffman[60] cases, the B.C. Council on Human Rights has started formally investigating the burgeoning number of age-based complaints lodged with it.

b) Youth-Based Discrimination

In its submission of June 30, 1989, the New Brunswick Youth Council stated that it:

> is convinced that violations to the rights of youth do occur repeatedly. Since youth is a temporary state where individuals are at various stages of development and maturity, they are therefore at various stages of taking responsibility for their actions or for their own welfare. They are also very often intimidated by adults around them who are seen as powerful and unchallengeable, and as a result young people may be reluctant to actively question the validity of an adult's decision, behaviour or judgment. Identifying and representing youth rights is a challenging endeavour. We believe however, that basic rights must be distinguished from privileges and should be universally applicable to all age groups.[61]

The Council's submission asserted that youth are subject to discrimination in all of the fields of activity covered under our New Brunswick Code and expressed the fear that "it would be reasonable to assume that, by their exclusion, those under nineteen can be discriminated against".[62]

At the conclusion of an exposition of its serious concerns with respect to discrimination in accommodation, public facilities and public services, the Council recommended that steps be taken to address these specific youth concerns. In addition, it made the following general recommendations with respect to the fundamental issues of the application of the legislation to youth and the delivery of human rights education.

> We recommend:
>
> 1. that section 2 of the Act be amended by striking the definition of age and that a section be added to read:
>
> > The New Brunswick Human Rights Act guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. that the Human Rights Commission and the Office of the Ombudsman further their efforts with respect to the education of young persons in the school system of their rights and freedoms.[63]

This remedial approach found strong support in the submission made to this inquiry by the Moncton Human Rights Association. The Association said:

> We firmly believe that any person regardless of age has an inalienable right to express themselves and progress with their lives unfettered by constraints or economic stumbling blocks, and we steadfastly implore that the revision in the wording of the Act will reflect this kind of virtue.[64]

In considering the extent to which youth-based age discrimination ought to be proscribed, one must be mindful of the statutory benefits and protections that are conferred on the young, including those relating to health, education and welfare. One ought to note also the delicate balancing of youth and adult rights and privileges sought in the United Nations 'Draft Convention of the Rights of the Child'[65] and the respect for the sanctity of the family contained in Articles 39 to 48 of the Quebec Charter.

c) Discrimination Respecting the Aged - The Compulsory Retirement Issue

The Supreme Court of Canada has yet to render its judgment regarding compulsory retirement. However, Courts of Appeal have considered the issue, beginning with the December, 1987, Ontario Court of Appeal in McKinney v. University of Guelph[66], and followed by the British Columbia Court of Appeal cases of Harrison v. U.B.C.[67] and Stoffman v. Vancouver General Hospital[68] of January 1988, and the Nova Scotia Court of Appeal decision in Sniders v. Nova Scotia (Attorney General)[69] of December 1988. All four of these cases are presently before the Supreme Court of Canada. Because of their importance and to assist in understanding the difficulty of the issue, they are discussed below in some detail.

The McKinney case involved applications brought by eight university professors and one librarian against four Ontario universities, alleging that section 9(a) of the Ontario Human Rights Code violated section 15 of the Canadian Charter. Pursuant to the Code, age was defined to encompass "eighteen years or more but less than sixty five years."

At the outset, the Court clarified that the issue under consideration was confined to Charter effects vis-à-vis mandatory retirement policies pertaining specifically to provincial universities. Consideration did not extend to compulsory retirement generally, since in the view of the majority, a constitutional reference would be required to achieve such a purpose.

The Ontario Court of Appeal found that the legislative provision contravened section 15; however, section 9(a) of the Code was found to constitute a "reasonable limit demonstrably justified in a free and democratic society...". The Court's focus on the university setting was critical to the finding of justifiability under section 1. Assessed were the overall objectives of section 9(a) of the Code:

> To provide for a compromise between conferring an uncontrolled right to work regardless of age and giving employers and employees the freedom to agree on a date for the termination of the employment relationship that would facilitate pension and other financial arrangements and minimize the need for dismissal for cause as ability declines with age, and to make provision for renewal of the work force by the employment of younger persons.[70]

Within the context of a university, the preservation of pension plans, facilitation of faculty renewal and negotiation of retirement dates in keeping with the system of tenure were "pressing and substantial"[71] objectives. There was, in the court's view, a clear "rational connection" between the stated objectives and the means adopted to permit age discrimination subsequent to attaining 65 years.

The twin cases of Harrison and Stoffman are similar in reasoning. The Harrison proceeding involved the claims by two university professors that the mandatory retirement clause of their employment contracts violated section 15 of the Charter.

The B.C. Court of Appeal held that section 8 of the B.C. Human Rights Act infringed section 15 in a way that could not be saved by section 1. The Court found that, although the legislative purpose was truly to protect the older worker, the distinction between those older and younger than age 65 was considered arbitrary and could not be said to be rationally connected to the objectives of protecting the older worker, i.e., when an infringement is in actual contrast to stated objectives, it could not be said that the means were proportionate to the ends sought to be achieved. Consequently, the definition provision affording protection was struck and found to be of no force and effect.

The Stoffman case involved a regulation under the B.C. Hospital Act,[72] providing for the termination of physicians' admitting privileges at the Vancouver General Hospital upon the attainment of age 65.

In applying the language of the Andrews decision, the impugned regulation was found to be both unreasonable and unfair. The B.C. Hospital Act regulation was at best assumptive in considering that doctors over 65 years of age tended to lower the "medical standards of the hospital."[73] The regulation was arbitrary and contrary to section 15 of Canadian Charter. Furthermore, pursuant to section 1, the objectives were not "sufficiently important to warrant overriding a constitutionally protected right...",[74] nor were "the means used to attain [that] end... demonstrably justified."[75] As a consequence, the regulation was not saved.

The Court warned of the dangers "of placing too much weight on administrative convenience in cases where the constitutional rights of individuals are at stake."[76] Concern in this regard centered on administrative aspects of removing physicians found incompetent "without imposing a general age for mandatory retirement."[77] In referring to Madame Justice Wilson in the Singh case[78], the Court reiterated that:

> Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, ...misses the point of the exercise under section 1....[79]

Moreover, the Court made mention of non-economic loss consequences of the infringement namely, "the loss of the self-esteem and sense of contribution and well-being that comes from practising one's profession."[80] Such losses were considered disproportionate to the regulation's objective.

In Sniders, the appellant was employed by the Camp Hill Hospital. He attained the age of 65 on July 20, 1986. His collective agreement expired March 31, 1986 but remained in effect pending the negotiation of a new agreement. The Camp Hill Hospital Policy required his retirement July 31, 1986. (Neither the collective agreement nor the Hospitals of Nova Scotia Pension Plan mandated such retirement.)

The hands of the Nova Scotia Human Rights Commission in relation to Mr. Sniders' complaint were tied, as the legislative protection under the Code was accorded only to those between the ages of 40 and 65. In response to the challenge of the validity of the Human Rights legislation and policy at Camp Hill, Grant J. at trial held that:

> (a) section 15 of the Charter applied to the Camp Hill Hospital and its mandatory retirement policy,
>
> (b) the mandatory retirement policy and the impugned provisions of the Human Rights Act discriminated on the basis of age contrary to section 15(1) of the Charter;
>
> (c) the limits on section 15(1) of the Charter were justified under section 1 thereof.[81]

Influential at trial was the expert testimony of one Dr. Pesando, who provided four rationales for compulsory retirement based on economic grounds:

> (a) [mandatory retirement] serves to enhance job and promotion opportunities for younger workers;
>
> (b) it provides a fixed date for termination around which both the employer and employee can plan;
>
> (c) it reduces the need for individual monitoring and evaluation; and,
>
> (d) it allows employers and employees to enter into lifetime compensation arrangements which involve the deferral of compensation.[82]

Such objectives were found to be rationally connected to the means and objectives of the impugned legislation. Although the hospital regulations and relevant provisions of the Human Rights Act violated section 15, they were saved by section 1.

On appeal, Mr. Justice Chipman of the Nova Scotia Court of Appeal had trouble with this reasoning. He found the evidence did not support the finding that the legislative objectives were pressing and substantial enough to override a Charter right. In His Lorship's estimation, "[Mr. Sniders] freedom to work as long as he is fit and willing is just as important as the advancing of youth employment, freedom of negotiations and administrative convenience, all of which were relied upon by Grant J. in reaching his conclusions."[83]

Regarding the proportionality test, Chipman, J.A. referred to Chief Justice Dickson in Oakes, supra;

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[84]

In finding the legislative scheme of no force and effect, Chipman, J.A. found "[t]he severity of job loss for no reason other than age,"[85] weighty and the nexus between means chosen and objectives to be achieved, weak. He concluded that "a convincing link between the age of 65 and the ability of the hospital to deliver the high level of care, teaching and research to which it aspires" was not shown.[86]

What may one expect when the Supreme Court of Canada renders its judgment, expected in 1990, with respect to mandatory retirement? It should establish whether the exceptions under Canadian human rights legislation are a demonstrably justified exception to the guarantee of age equality under section 15 of the Charter. In so doing, it may be expected to place on the scales of justice the following arguments for and against mandatory retirement:

Arguments for mandatory retirement:

- it makes jobs available for young people and provides income support for them and their families;
- it provides for the upward mobility of workers and infuses the marketplace with new ideas and methods;
- it relieves management of the need to assess all workers, concurrently protecting the aging worker from the impact of negative assessment;
- it takes account of older workers' physical and mental shortcomings, their stagnation and use of outdated methodology;
- it enables orderly financial and emotional planning for retirement.

Arguments against mandatory retirement:

- it deprives a worker of a sense of self-worth, thus defeating the objective of the work ethic;
- it is expensive to government social programs because of the removal of an increasingly larger sector of the work force;
- it has been demonstrated to adversely effect the health and mental being of workers;
- it is based on stereotypes that do not take into account the individual abilities of workers;
- it overlooks the inadequacy of pension plans, most of which are not indexed, and precludes retirees from enjoying the lifestyle to which they have become accustomed;
- it does not result in significant administrative efficiency, as only .08% of workers has indicated a preference to work beyond the normal retirement age.[87]

The New Brunswick Federation of Labour:

> supports the position that retirement should be voluntary and not at a fixed age, except where unions have negotiated a retirement age. The law, we contend, should in no way prohibit unions from negotiating a compulsory retirement age.[88]

The Commission's legal counsel has pointed out the irony that the sole determinant of a person's right to work may be the existence of a company retirement plan.[89]

It is noteworthy that Professor Fletcher's Survey found that only 30% of the general "citizen group" and 39% of the "elite group" opined that requiring professors to retire at 65 is an unjustified form of age discrimination. Conversely, 52.4% of the former and 42% of the latter group responded affirmatively that it is an acceptable way of making room for younger professors.[90]

RECOMMENDATIONS:

4.19 **It is recommended that the New Brunswick Charter prohibit age discrimination.**

4.20 **It is recommended that the definition of 'age' in section 2 of the New Brunswick Human Rights Code be repealed.**

4.21 **It is recommended that the New Brunswick Charter provide that youth-based age discrimination be prohibited except in accordance with a statute in force in the Province.**

4.22 **It is recommended that sections 3(6)(a) and (b) of the New Brunswick Human Rights Code, which provide for age discriminatory pension and insurance plans, be repealed.**

4.23 **It is recommended that the Lieutenant-Governor in Council make regulations, on the recommendation of the New Brunswick Human Rights Commission, prescribing distinctions, conditions, requirements on qualifications that shall be deemed to be bona fide and reasonable in respect of an employee pension, insurance or other benefit plans, whether provided by individual contract, collective agreement or otherwise (as in section 14(7) of Manitoba Code).**

4) Physical and Mental Disability

a) Introduction

The legislative history of the incorporation of physical and mental disability as prohibited forms of discrimination reflects the ongoing human rights struggle faced by disabled persons. Nearly a decade transpired between the original passage of the Human Rights Act (1967) and the incorporation of "physical disability" as a prohibited form of discrimination (1976). Another nine years awaited the further extension of the Code's protection to the mentally disabled (1985). There is no question that both physical and mental disability must be included as grounds upon which discrimination is prohibited. Indeed, both are enumerated in section 15 of the Canadian Charter and in all Canadian human rights codes.

The issues which must be addressed with respect to these heads include:

(1) the appropriate definition of mental and physical disability, including questions related to:
  (a) inclusion of dependence on alcohol and drugs as a specific example;
  (b) inclusion of AIDS as a specific example;
  (c) inclusion of means to palliate the handicap;

(2) whether the failure to make reasonable accommodation for those with special needs should be part of the definition of discrimination;

(3) the safeguarding of fundamental justice for the mentally disabled.

b) Definition

The meaning of physical disability and mental disability is not defined in the Canadian Charter. It is likely that the courts, when interpreting these meanings, will look to provincial human rights codes since the Supreme Court of Canada has stated that "generally, the principles applied under the human rights acts are equally applicable to questions of discrimination under [the Charter]".[91]

Although the present New Brunswick definition is comprehensive in most respects, its inclusion of the word 'malformation' and 'disfigurement' is regrettable. First, these words reenforce negative stereotypes about the disabled. Secondly, disability should refer to malfunction, not lack of aesthetic symmetry.

The definitions provided under Canadian statutes are very liberal. One commentator has said that this trend will continue in the Charter interpretation of disability: "an important factor in determining whether a particular condition amounts to a disability is the principle that Charter guarantees should... not be interpreted in an unduly technical... or restrictive manner".[92]

The following definition found in section 3(1)(d.1) of the Saskatchewan Code is perhaps the most comprehensive:

> 3(1)(d.1) 'disability' means"
> (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes:
>
> (A) epilepsy;
> (B) any degree of paralysis;
> (C) amputation;
> (D) lack of physical co-ordination;
> (E) blindness or visual impediment;
> (F) deafness or hearing impediment;
> (G) muteness or speech impediment; or
> (H) physical reliance on a guide dog, wheelchair or other remedial appliance or device; or
>
> (ii) any of:
>
> (A) a condition of mental retardation or impairment;
> (B) a learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language; or
> (C) a mental disorder.

It has been suggested that the definition might also incorporate (as per section 9(1)(b)(v) of the Ontario Code):

> an injury or disability for which benefits were claimed or received under the Workers' Compensation Act.

A major concern arising from such broad definitions is that its very inclusion of more people under the umbrella of protection might reduce benefits that go to the very disabled. Another possible danger inherent in such an encompassing definition is the restriction of rights of those deemed mentally disabled under a broad definition.

Professor Donald Poirier has pointed out that such a problem obtains for the elderly, i.e., there is extensive legislative authority for the curtailment of the rights of an elderly person on the basis of perceived mental and/or physical disability. For these reasons, the definition should not be overly inclusive.[93]

The Canadian Human Rights Commission expressly lists drug or alcohol dependence as a physical disability, subject to broad reasonable exceptions. Drug dependence as such is not a reason to discriminate, even if the dependence is current; however, an employer is not required to keep an employee who, after reasonable accommodation has been made, cannot safely and effectively do the essential aspects of the work. The Commission takes the position that such an addiction is an illness, not a voluntary state. However, the inclusion of this condition as a disability is problematic since it appears to contain a large element of voluntariness.

A recent B.C. Human Rights Council hearing further expanded the meaning of physical disability in two important ways.[94] First, it affirmed that people with AIDS have a disability under the B.C. Act and therefore can claim its protection if discriminated against. Moreover, the Council decreed that the Act also protects those who are discriminated against because they are in a high risk group and are therefore suspected of having AIDS. The present New Brunswick practice conforms with this ruling.

It is likely that persons with AIDS will be the subject of much more discrimination. This reality was convincingly set out in the submission made by AIDS-NB.[95] It has been suggested that AIDS be expressly used as an example of disability in the definition section.

There are two ways to prevent discrimination against those who use devices to cope with their disability. The "use of any means to palliate a handicap" could be included as part of the definition of disability. Alternatively, discrimination could be prohibited on the basis of disability or any means to palliate such disability.

c) Reasonable Accommodation

Should a "failure to make reasonable accommodation for those with special needs" be included as part of the definition of discrimination? Should employers, vendors, landlords for example be required to make an extra effort to accommodate the disabled in a legislatively enforceable way? "Without it", it has been suggested, "employers are allowed to stand at the top of a flight of stairs and advise handicapped job applicants that they are welcome to apply for the job if they can only wheel up the flight of stairs."[96]

A reasonable accommodation provision exists in section 9 of the Manitoba Act, and in section 7 of the Yukon Act. This provision is justifiable in terms of need. In 1986, 63% of disabled Canadians had annual incomes of less than $10,000. Fewer than 40% were working at all.[97] No other group liable to discrimination are in such desperate straits. Many believe that the existing legislative provisions are words without effect. The provision is also rationally defensible in that disabled people frequently have all the attributes necessary to a particular employment situation.

Canadian courts have often enforced the legal duty to take positive action to accommodate the unique needs of the disabled. One of the most common examples of this accommodation is a reorganization of some work duties so that a disabled person will trade some duties with a non-disabled employee.

In Canadian Odeon Theatres Ltd. v. Huck,[98] the Saskatchewan Court of Appeal considered a complaint that a theatre owner discriminated against a wheelchair user by offering him either a seat which he couldn't properly use or an inferior viewing position. The Court's determination of 'genuine equality' was elucidating. The Court observed that a disabled person does not acquire status when offered regular facilities he is not capable of using. This enumerated group is therefore entitled to special treatment where necessary to produce results comparative with those received by others. This duty of provision of access to the service rather than simply the service could have significant ramifications for the disabled community if this duty was entrenched in the New Brunswick Charter. In fact, if it is not, "equality and equality of opportunity is something we have accepted as a principle, but have yet to fully implement as a practice."[99]

In the O'Malley decision, MacIntyre, J. held that such an obligation existed unless the employer has satisfied the burden of proving that the necessary adjustments would constitute an undue hardship to the business.[100] In another Supreme Court decision, this passage was cited in a discussion about barriers that exist in employment: "If the access is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality." [101] Physical accessability to buildings is the first step.

This issue was also addressed in K.S. Bhinder and the Canadian Human Rights Commission v. C.N.R.[102] The Supreme Court of Canada asked whether the Canadian Human Rights Act required employers to accommodate individuals by varying standard rules or practices. The majority decided that the Act foreclosed any duty to reasonably accommodate an individual once the requirement is established to be bona fide for the occupation in question. Immediately upon the delivery of this decision, the Canadian Human Rights Commission issued a Special Report to Parliament which fully explained the decision and its ramifications, and concluded with this recommendation: "that a provision be added to the Canadian Human Rights Act explicitly stating that it is a discriminatory practice to refuse to make reasonable accommodation for special needs or obligations related to a prohibited ground of discrimination".[103]

In its July 7th, 1989, submission, the Canadian National Institute for the Blind recommended four major initiatives including: a) the development of guidelines to ensure access by the blind and visually-impaired to public buildings; b) the completion of steps to make public documents, job application forms, etc. readily available to blind and visually-impaired New Brunswickers in braille, large print or audio cassette; c) the adoption of procedures by the Human Rights Commission to accept complaints in alternate formats and d) the completion of legislative steps to ensure that blind and visually-impaired voters are able to vote independently.[104]

Similarly, the Premier's Council on the Status of Disabled Persons queried "whether the Commission has had experience in serving persons who were deaf and would need sign language and interpreter's services. Do they have a list of appropriate interpreters and a budget to cover this expense?"[105]

Ms. Patricia Curtis, the Executive Director of the Canadian Deaf-Blind and Rubella Association of New Brunswick, pointed out that:

> Because of the uniqueness of deaf-blindness, I see our people needing two (2) basic rights: 1) the right to an Intervenor and 2) the right to give and receive information.
>
> Deaf-Blind people in New Brunswick have several different languages i.e. sign language, tactile sign language, braille, finger spelling and verbal. They should

> have the right to receive information and communicate in the language they have learned. This can easily be achieved through an Intervenor; however, funding is very difficult to get. An Intervenor is needed to intervene in the community, school, work place and anywhere else the deaf-blind person wishes to be a part of.[106]

The comments of these community leaders appear to suggest strongly that the provisions of section 12 of the Manitoba Code be incorporated in our statute:

> For the purpose of interpreting and applying sections 13 to 18, the right to discriminate where bona fide and reasonable cause exists for the discrimination, or where the discrimination is based upon bona fide and reasonable requirements or qualifications, does not extend to the failure to make reasonable accommodation within the meaning of clause 9(1)(d).

Moreover, reference may usefully be had to Section 7 of the Yukon Act, entitled "Duty to provide for special needs". It states, in part, that:

> 7(1) Every person has a responsibility to make reasonable provisions in connection with employment, accommodations, and services for the special needs of others where those special needs arise from physical disability, but this duty does not exist where making the provisions would result in undue hardship.
>
> 7(2) For the purposes of subsection (1), "undue hardship" shall be determined by balancing the advantages and disadvantages of the provisions by reference to factors such as
>
> (i) safety,
> (ii) disruption to the public,
> (iii) effect on contractual obligations,
> (iv) financial cost,
> (v) business efficiency.

d) Safeguarding of Fundamental Justice for the Mentally Disabled

There are two predominant discriminatory practices that affect the mentally disabled - lack of judicial safeguards, and use of broad labels that disqualify the mentally disabled.

Lack of evidentiary and procedural protection for those detained for lack of capacity exists under many provincial Mental Health Acts.[107] People can be apprehended and involuntarily treated without being informed of the basis in law or fact for their detention or of their right to counsel. They are not advised of their right to petition the court for a discharge order. Requirements for involuntary admissions are usually broadly phrased, giving much discretion to doctors and the psychiatric review boards. This right to procedural and evidentiary fairness is particularly important in light of the right to fundamental justice enshrined in the Charter.

In Dayday v. MacEwan,[108] the provisions of the Ontario Statutory Powers Procedure Act which empowered the Mental Health Review Board to adjudicate on the appropriateness of continuing the treatment of an involuntary patient were questioned:

> The appellant challenged section 13: "a tribunal may admit as evidence at a hearing...whether or not admissible as evidence in a court (a) any oral testimony and (b) any document or thing, relevant to the subject matter of the proceedings."[109]

The appellant argued that the mentally disordered person was being deprived of her liberty by hearsay evidence which could not have been admitted into a trial determining the liberty of a lucid person. Did this lack of evidentiary protection constitute discrimination by reason of mental disability? Matlow D.C.J. implicitly recognized that there was an inequality here but that it did not constitute discrimination because the purpose of the (albeit unequal) treatment was valid.

Specifically, he noted that two objectives are competing here, the protection of society, and the safeguarding of the interest of the mentally disabled. In order to maintain the balance, the interests of the mentally disabled will not always be paramount. On the one hand, he implied that there is a particular onus upon the trier of fact to be vigilant in such proceedings. However, he also noted that one rationale for the lowering of the standard of admissibility is to benefit the disabled, the hearing must be expeditious so that people will not be confined without authorization. In short, the requirements were bona fide exceptions to the general rule.

It should be noted that the New Brunswick Mental Health Act has been extensively amended during the 1989 Legislative Session[110], resulting in the conferral of additional rights on the mentally disabled, in particular, preadmission hearing rights and a measure of freedom to accept or refuse medical treatment. In addition, the amendments contemplate the establishment of an office of patient's advocate to provide intervenors for the mentally disabled with respect to current and proposed remedial mechanisms.

RECOMMENDATIONS:

4.24 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of physical and mental disability pursuant to a comprehensive

definition of disability as it is found in the Saskatchewan and Ontario statutes.

4.25 **It is recommended that the definition of 'disability' avoid the use of terminology that may reinforce negative stereotypes about the disabled.**

4.26 **It is recommended that consideration be given to including in the definition of 'disability' a reference to AIDS as a specific example of a physical disability.**

4.27 **It is recommended that consideration be given to the inclusion in the definition of 'disability' a reference to dependence on alcohol and/or drugs as a specific example.**

4.28 **It is recommended that the concept of "reasonable accommodation" be incorporated into the New Brunswick Charter, the general application of which would have particular relevance to discrimination on the basis of disability. It is suggested that section 12 of the Manitoba Human Rights Code may serve to resolve much of the confusion which has resulted from the Bhinder and O'Malley decisions.**

4.29 **It is recommended that the New Brunswick Government immediately take steps to make its services more accessible to the disabled and that such steps be taken as part of a formal coordinated effort with private and public advocacy representatives.**

5) Marital Status

The New Brunswick Code and those of the twelve other Canadian jurisdictions extend protection from discrimination on the basis of marital status. (It is referred to as "civil status" in Quebec). Section 9 of the Ontario Code states that marital status "means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in conjugal relationship outside marriage".

Such a comprehensive definition served to strike down requirements that the occupants of certain types of rental accommodation, e.g., armed services personnel, be legally married.[111]

This protection applies with respect to the sale of realty, e.g., a limitation by a realtor to sell only to married couples, not to singles. The inclusion of this ground also provides greater scrutiny over a bank that would refuse credit to a person whose spouse was a poor credit risk.

Another common form of discrimination occurs in employment. Some applicants are refused employment which involves posting to foreign locales because they are married. Some are refused employment because they have spouses who are subject to transfer. This occurred in the case of Rinn and Russell v. Keewatin Air Limited,[112], where the complainant was dismissed because the company found it more convenient to employ single pilots. In Cashin v. Canadian Broadcasting Corporation,[113] it was held that the identity and profession of the complainant's husband was mistakenly a large consideration in her dismissal.

RECOMMENDATIONS:

4.30 **It is recommended that the protection afforded on the basis of marital status be retained in the New Brunswick Charter.**

4.31 **It is recommended that the New Brunswick Charter incorporate a definition of 'marital status' similar to that found in section 9 of the Ontario Code.**

6) Sex

Two landmark decisions handed down by the Supreme Court of Canada in May, 1989, have broadened and clarified the prohibition against discrimination on the basis of sex which is found in the New Brunswick Human Rights Act.

In Brooks v. Canada Safeway Ltd.,[114] the Court decided that discrimination on the basis of pregnancy is discrimination on the basis of sex. The following summary underscores the unequivocal manner in which the Supreme Court of Canada has dealt with this issue:

> Discrimination on the basis of pregnancy is discrimination on the basis of sex. The decision in this Court in Bliss, which reached the opposite conclusion, is inconsistent with the Court's approach to interpreting human rights legislation taken in subsequent cases and should no longer be followed. Pregnancy discrimination is a form of sex discrimination simply because of the basic

> biological fact that only women have the capacity to become pregnant. Appellants' disfavoured treatment under the plan flowed entirely from their state of pregnancy, a condition unique to women. Those who bear children and benefit society as a whole should not be economically or socially disadvantaged. It is thus unfair to impose all of the costs of pregnancy upon one half of the population.
>
> It is also wrong to believe that pregnancy related discrimination could not be sex discrimination because not all women become pregnant. While pregnancy based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group. Indeed, pregnancy cannot be separated from gender.[115]

In Janzen v. Platy Enterprises Ltd.,[116] the Supreme Court of Canada held that sexual harassment in the workplace is discrimination on the basis of sex. The Chief Justice of Canada, in a judgment that extends to the meaning of all forms of discriminatory harassment, opined that:

> Sexual harassment is a form of sex discrimination. Sexual harassment in the workplace is unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. By requiring an employee, male or female, to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. Here, the sexual harassment suffered by the appellants constituted sex discrimination for it was a practice or attitude which had the effect of limiting the conditions of employment of, or the employment opportunities available to, an employee on the basis of a characteristic related to gender.[117]

The combined effect of these two decisions is that a prohibition against discrimination on the basis of sex is sufficient for all legal purposes. However, for the sake of clarity and for educational purposes, consideration should be given to a broader wording under this head. Such a course of action has been recommended by the New Brunswick Federation of Labour and the New Brunswick Advisory Council on the Status of Women.[118]

In reviewing legislative models, it is noted that section 15 of the Charter and all Canadian human rights statutes prohibit sex discrimination. The terminology used by these jurisdictions includes:

- "sex" including pregnancy or child-birth (Fed.);
- "sex" (N.B.; Alta.; B.C.; Nfld.; N.S.; P.E.I.; Sask.);

- "sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy" (Man.);
- "sex, which includes the right to equal treatment without discrimination because a woman is or may become pregnant" (Ont.);
- "sex, pregnancy" (Que.);
- "sex, including pregnancy and pregnancy related conditions" (Yukon);

There are related prohibitions against discrimination on the basis of gender in other Canadian statutes. First, in section 57 of the Quebec Charter both "...husband and wife have, in marriage, the same rights, obligations and responsibilities." (This is similar to section 2 of the New Brunswick Marital Property Act)[119]

Second, the Canadian Human Rights Act and the Codes of seven provinces and territories stipulate that no employer shall pay women a lower rate of pay than men who are performing a substantially similar job. The question arises whether these equal pay directives ought to be incorporated into a human rights act or, as in New Brunswick, included in the Employment Standards Act? Or, should wage parity be protected under both Acts?

The Federation of New Brunswick Faculty Associations recommends that they be incorporated into the New Brunswick Charter and that the broad provisions of section 11 of the Canadian Human Rights Act serve as a model for such action. However, given a coordinated governmental implementation of the New Brunswick Charter, it would seem appropriate to retain the equal pay provisions of the Employment Standards Act. Indeed, it would also seem appropriate to place pay and other employment equity programs within the authority of the Department of Labour.

RECOMMENDATIONS:

4.32 It is recommended that the New Brunswick Charter retain and clarify the prohibition against sex discrimination by incorporating the definition used in the Manitoba statute, namely, "sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy".

4.33 It is recommended that consideration be given to reposing in a single governmental authority the administration of the implementation of equitable wages with respect to men and women.

4.34 It is recommended that the prohibition against sexual harassment be subsumed in the broader notion of "harassment" (see Recommendation 4.56 below).

C) New Proscribed Grounds of Discrimination

1) Introduction

As set out in Table 4C (page 189), there are a number of proscribed grounds of discrimination found in other Canadian human rights enactments that have not been incorporated in the New Brunswick Code. This report examines each of these grounds and offers an opinion as to their inclusion in the New Brunswick Charter.

2) Criminal Charge, Record of Conviction, Pardoned Offence

a) Introduction

The Office of the New Brunswick Ombudsman has recently received two complaints - one related to trades licensing and the other to the loss of casual employment - that appear to raise serious concerns about the effects of New Brunswick's failure to provide human rights protection with respect to this ground of discrimination.

As the following discussion attests, the issue is not as straightforward as one might wish. Indeed, no fewer than three terminological formulae have been adopted with respect to it.

b) Criminal Charge

Currently, only the Yukon Human Rights Act employs the ground of 'criminal charge' although the Canadian Human Rights Commission has also recommended that it be included. This would protect a person to whom a stigma attaches in an instance where one is charged, but not necessarily convicted (e.g., until recently, Canadian Police Information Centre records retained information about a criminal charge against a person in an instance where no conviction was entered with respect to it).[120]

The broadening of protection to one who only has been charged seems eminently fair. It upholds the fundamental principle expressed in the United Nations Covenant on Civil and Political Rights and the Canadian Charter of Rights and Freedoms, i.e., a person shall be presumed innocent unless proven otherwise.

c) Record of Conviction

Three jurisdictions protect their citizens from discrimination on this basis, British Columbia, Quebec and the Yukon. This is obviously more problematic since it indicates that a person has been found guilty of a crime. One must weigh two conflicting rights. On the one hand, a person who has served a sentence has already made amends. Moreover, a person is less likely to be a recidivist if he or she is employed. On the other hand, an employer ought to have the right to assess the background of a potential employee and to assess any risk the potential employee might pose to the business. In the jurisdictions where record of conviction is a prohibited ground of discrimination, the legislation effects a balance. Thus, the Quebec Charter requires that a person cannot be discriminated against on the basis of a prior offence as long as "the offence was in no way connected with the employment". Similarly, the British Columbia Code stipulates that there shall be "no discrimination with respect to employment because of a conviction for a criminal or summary conviction charge that is unrelated to the employment or intended employment".

A British Columbia tribunal[121] has established the following guidelines to determine whether the charge was related to the employment:

(1) Does the behaviour for which the conviction was made, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?

(2) What were the circumstances of the offence and the particulars e.g., age of the individual at time of Commission, extenuating circumstances?

(3) How much time has elapsed since the offence? Do the person's activities since the offence show tendencies to repeat the offence, or rehabilitation?[122]

A fourth consideration could be added:

(4) Is the offence one that is likely to be repeated? Certain offences may obtain a particularly high rate of recidivism.

Mr. Justice Walter S. Tarnopolsky has approvingly noted that this "provides a useful model for other statutes which incorporate a b.f.o.q. defence on the ground of criminal conviction".[123] This 'model' could form part of the regulations of the New Brunswick Charter.

d) Pardoned Offence

Five jurisdictions prohibit discrimination on the basis of pardoned conviction - the Federal Act and those of Ontario, Quebec, the Northwest Territories and the Yukon. A pardoned offence, being one for which the state has officially granted forgiveness after consideration of relevant factors, should not be allowed to hinder one in the pursuit of employment, housing or services.

RECOMMENDATIONS:

4.35 It is recommended that the New Brunswick Charter prohibits discrimination with respect to the laying of a criminal charge against a person, a record of conviction, or for a pardoned offence "unless bona fide and reasonable cause exists for the discrimination".

4.36 It is recommended that the Lieutenant-Governor in Council, on the recommendation of the New Brunswick Human Rights Commission, make regulations to establish the criteria for establishing a bona fide exception with respect to this prohibition.

3) Family Status

The Federal Act and that of the provinces of Ontario, Quebec, Manitoba and the Northwest Territories give persons protection from discrimination on the basis of family status.

The Ontario Code defines "family status" as "the status of being in a parent and child relationship". This form of discrimination is frequently manifested in the refusal to allow children into housing units or the refusal to hire single parents because of the assumption that their child-rearing function will detract from their ability to perform on the job.

It is often presumed that marital status includes family status. Although the definitions are not identical, the former is often interpreted as including the latter. The wiser course might be to expressly include both.

In recommending such a step, the New Brunswick Advisory Council of the Status of Women has pointed out that:

> [TRANSLATION] In New Brunswick, the law does not prohibit discrimination based on family status, a concept that must not be confused with marital status. Landlords can use this to refuse to rent living accommodations to people with children. We have all seen ads that say: No children, no pets.
>
> Including the family status in the Human Rights Act would protect parents who are having considerable difficulty finding housing, especially those with low incomes.[124]

The Multicultural Association of the Greater Moncton Area has endorsed the Advisory Council's recommendation.[125]

RECOMMENDATIONS:

4.37 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of family status.

4.38 It is recommended that the New Brunswick Charter include a comprehensive definition of family status.

4) Language

The appropriateness of discussing language rights within the context of human rights may not be self-evident.

On the one hand, individual and communal rights to preserve and enjoy one's language have long been recognized in international human rights conventions. In particular, they guarantee that all human rights will be enjoyed without prejudice arising from an individual's language. For instance, Article 2 of the International Covenant on Economic, Social and Cultural Rights provides that:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (emphasis added)

Article 2 of the International Covenant on Civil and Political Rights uses virtually the same language, and a similar provision may be found in Article 2 of the Universal Declaration of Human Rights. All these provisions stem from and reinforce the purposes for which the present international order was established. These purposes are outlined in Article 1 of the Charter of the United Nations which reads, in part, as follows:

> The purposes of the United Nations are: to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; (emphasis added)

This underscores the fact that, from the very beginning, as one of the four fundamental heads of discrimination - those which are sometimes referred to as the 'holocaust provisions' - language discrimination was included as a prohibited head of discrimination. While the above-mentioned provisions are principally an interpretive guide to the U.N. International Bill of Rights, there is a provision in the International Covenant on Civil and Political Rights which is a substantive guarantee of equality and which prohibits all forms of discrimination. Article 26 of that Covenant declares that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. (emphasis added)

Consequently, one notes that in many equality provision found in the international human rights instruments, language discrimination is addressed and prohibited as a specific head of discrimination. In addition, the Treaty of Rome - the 1950 human rights document establishing the European Human Rights Commission - also guarantees that the rights set out in that Convention will be secured "without discrimination on any ground such as(...)language."[126] The Inter-American Convention speaks in Article 1 of the Obligation to Respect Rights and declares:

> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, status, birth, or any other social condition. (emphasis added)[127]

At international law, language rights are a human rights concern; they are part and parcel of the same provisions that prohibit all other forms of discrimination.

In Canada, only Quebec's human rights legislation makes any mention of language rights, although section 6 of the Yukon Code does make an oblique reference to 'linguistic origin'. Moreover, while the Canadian Charter of Rights and Freedoms does speak of the multicultural heritage of Canada in section 27, and does provide for several important language rights in sections 16 through 22 (and also for minority-language education rights in section 23), a draft version of section 15 of the Charter that contained "language" as a proscribed ground of discrimination was eventually dropped from the final text. Finally, it is noted that the Supreme Court of Canada has put forth the notion that language rights in the Charter are somehow less equal than others, given that they are the product of political compromise.[128]

The initial reluctance in New Brunswick to include language in the Human Rights Act apparently stemmed from the belief that language rights were so fundamental that they had to be addressed by specific legislation containing explicit guarantees. The Official Languages Act and the Human Rights Act, which were drafted at roughly the same time, by the same administration, were meant to be complementary.[129] It is arguable that a similar complementariness obtains from the provision of the Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick.[130] This 1981 Act, along with the language rights provisions of the Canadian Charter of Rights and Freedoms, and the recent amendments of the federal Official Languages Act,[131] represent the latest developments in the field of minority language protection.

It is noted that the approach taken in Bill 88, while novel with respect to its community or collective rights focus, is in many aspects strikingly similar to the interpretation given by the United Nations to Article 27 of the International Covenant on Civil and Political Rights with respect to the right to distinct institutions, the duty on states to take positive measures and the idea that where "linguistic groups of roughly equal numerical size co-exist [the minority guarantees are] applicable to them all".[132]

In the research paper prepared by Mr. Christian Whalen, the author argues convincingly that the incorporation of Bill 88 in the New Brunswick Charter could serve as both a step towards its full constitutional entrenchment and as a means of using our unique language legislation to promote harmony and understanding between our two linguistic groups within a broader multicultural context. He asserts that:

> Yet there is another interpretation of Bill 88 which is more favourable to both multiculturalism and the goal of language equality, an interpretation which is most consistent with provincial and federal policies of bilingualism and multiculturalism, with our human rights acts and with the provisions of the international human rights bill outlined above. Such an interpretation would insist on distinguishing between language rights and cultural rights, as is done in the interpretation of Article 27. It would view Bill 88 as a legislative enactment which discriminates in favour of two official language groups but which remains culturally neutral. Moreover it would recognize in the declaration of equality of both official language communities the implicit directive to promote as a positive duty the multicultural fabric of New Brunswick within each language community.
>
> This [research paper] strongly recommends the adoption of such an interpretation of Bill 88, not only because it is consistent with the province's policy on multiculturalism and its commitment to human rights, but also because it would successfully carry out the spirit of the Act. Full equality of both official language communities in New Brunswick would ensure that both communities are equally attractive to new immigrants to the province and that the survival of each language community would not be entirely at the mercy of its own birthrate. Neither language community should be viewed as a component of multicultural New Brunswick; rather, both language communities should be viewed as loose associations, the guardians of the official media through which our multicultural values and heritages emanate. Obviously, such a language policy is one which looks to the future more than to our past, but insofar as our past is not a perfect model of linguistic equality, there is a need for new directions.[133]

Such an interpretation quite naturally suggests that, in addition to the inclusion of Bill 88 in the New Brunswick Charter, such an instrument should also incorporate language as a proscribed ground of discrimination.

The author addresses the potential concerns raised by such an extension:

> The recommendations affecting language rights largely reinforce rights which are presently enjoyed. They are mitigated by being framed in the context of recognized human rights based on international instruments and in the context of a new policy of multiculturalism which embraces the dominant cultural groups

> in both linguistic communities. Moreover, the Human Rights Commission seems to be the natural body to be responsible for handling complaints concerning language rights as well as for carrying out the educational mandate required to instill principles of linguistic equality throughout the province: this is argued, both for reasons of efficiency, and because of the Commission's acquired expertise in related fields. Beyond this reasoning, however, and beyond the fact that, internationally, such commissions are mandated to oversee language rights as they are those of other minorities, it would appear that, given the tension which has surrounded the Official Languages Act and the province's language policy, it would be advisable to deal henceforth with language issues from the broader perspective of human rights. Moreover, by means of the enactment of such a broad provincial charter of rights, ... the government could most effectively respond to the calls for entrenchment of Bill 88.[134]

These are bold ideas which one would hope might be the subject of serious consideration.

RECOMMENDATIONS:

4.39 **It is recommended that the New Brunswick Charter include a provision recognizing the equality of both official linguistic communities in New Brunswick and recognizing the duties which flow from that equal status as outlined in Bill 88.**

4.40 **It is recommended that the New Brunswick Charter recognize the multicultural character of each official linguistic community and recognize also the collective right of any linguistic, ethnic and religious groups to speak their own language, to enjoy their own culture and to practice their own religion.**

4.41 **It is recommended that the New Brunswick Charter make explicit reference to the duty which lies on the State to safeguard the enjoyment of human rights by positive measures aimed at the promotion and preservation of our linguistic, ethnic and religious minority communities, within limitations such as the desire and initiative of the minorities themselves, political stability, level of economic development and proportionality of costs and benefits.**

4.42 **It is recommended that the New Brunswick Charter include language as a proscribed ground of discrimination.**

4.43 It is recommended that the New Brunswick Charter expressly include as one of its legal rights, the right to be heard in a court or tribunal in the official language of one's choice by a decision-maker who speaks and understands the official language chosen.

4.44 It is recommended that the New Brunswick Charter include a provision recognizing the right of access, in the official language of one's choice, to public service in the Province.

4.45 It is recommended that consideration be given to the inclusion in the New Brunswick Charter of a right to public schooling for one's children in the language of one's choice. Such a right would guarantee schooling in one's own language to all New Brunswick students whether their first language be English or French. It would also guarantee the right to immersion schooling where the parents desire their child's second official language to be the language of instruction.

5) Nationality, Citizenship

The New Brunswick Code presently provides no protection from discrimination on the basis of either nationality or citizenship. However, protection does appear to be available to the extent that these items are derivatives of other headings above, in particular national or ethnic origin.

Currently, two provinces - Manitoba and Saskatchewan - and the Northwest Territories cite nationality as a prohibited ground. One province - Ontario - prohibits discrimination on the basis of citizenship.

The definitions of these terms are as follows:

Nationality The status of either citizenship or that of a person who, though not necessarily a citizen, owes permanent allegiance to the state and is entitled to its protection.[135]

Citizenship The status of being a person endowed with the full political and civil rights in the body politic.[136]

The inclusion of this ground is not a straightforward notion. For example, a request for this type of information from a job applicant is not discriminatory per se because a factor such as relevant Canadian job experience may well be a bona fide occupational requirement. However, if nationality or citizenship is not a bona fide requirement, such information should not be solicited; i.e., its use to screen out persons because of their race or origin would be invidious.

At first glance, the Canadian Charter does explicitly place some rights beyond the group of non-citizens in sections 3, 6(1), 23(1) and 20. However, the non-discrimination section of the Charter protects every individual. The recent Supreme Court of Canada decision in Andrews v. Law Society of British Columbia[137] invalidated section 42 of the Barristers and Solicitors Act of B.C. which required Canadian citizenship as a qualification for admission to the British Columbia Bar.

The Legal Counsel of the New Brunswick Human Rights Commission and the Deputy Minister of Justice have both recommended that subsection 7(2) of the Human Rights Act be repealed as a result of the Andrews decision.[138] This subsection permits a professional association or a business or trade association to statutorily restrict membership to Canadian citizens or British subjects.

More generally, Andrews suggests that any discriminatory action based on nationality or citizenship should be viewed suspiciously and that the protection of the statute should be broad and clear.

RECOMMENDATIONS:

4.46 **It is recommended that the New Brunswick Charter prohibit discrimination on the basis of nationality or citizenship.**

4.47 **It is recommended that section 7(2) of the New Brunswick Human Rights Code, dealing with citizenship prerequisites of association membership, be repealed.**

6) Place of Residence

During the past decade, the New Brunswick Human Rights Commission and the Office of the Ombudsman have received a number of complaints related to discrimination on the basis of residence; in particular, municipal employees have complained of the requirement that they reside within municipal boundaries in order to obtain or retain employment with a municipal corporation. In at least one case, the New Brunswick Court of Appeal subsequently confirmed that the protection afforded by section 6 of the Charter - mobility rights - did not extend to practices within provincial boundaries.[139]

The Northwest Territories is alone among Canadian jurisdictions that have provided protection on the basis of place of residence. Through discussion with the former Director of Employment Standards for the Territories, it was learned that this inclusion resulted from the practice of a resource development corporation that was hiring local and extra-provincial employees for a major project. As part of its recruitment effort, the corporation offered extra-provincial employment candidates a higher rate of pay than locals with respect to identical positions. The inclusion of "place of residence" in the statute was designed to correct this impugned practice.[140]

The inclusion of this protection, which is a logical extension of section 6 of the Canadian Charter, has been recommended by the former chairman of the New Brunswick Human Rights Commission, Dr. Noël Kinsella.[141]

RECOMMENDATION:

4.48 It is recommended that "place of residence" be included as a prohibited ground of discrimination under the New Brunswick Charter.

7) Political belief

In reviewing the legislative history of the first New Brunswick Human Rights Act and its 1971 successor legislation, the major preoccupation of the legislators as reflected in the Synoptic Proceedings of the Legislative Assembly of New Brunswick was the respective administrations' failure to include protection from discrimination on the basis of political belief.[142]

Perhaps the most articulate expression of this concern was that by a former Minister of Education of New Brunswick, the Honourable Claude Taylor. Speaking in the Legislative Assembly on the introduction of the New Brunswick Human Rights Code (April 6, 1967), he stated that:

> I say that what was done in 1952, which has been done for generations and generations before, is wrong. In fact, in one election, my colleague in this house from Albert County was a road commissioner, and they came into the gravel pit and said, "Put your shovel down now, right this minute, drop it at this

> spot and get out of here!" Now that was wrong. That sort of thing was wrong in 1952, it was wrong in 1960, and it's wrong today. Let's stop it.[143]

It appears that a need for such protection continues to exist in New Brunswick, and Canada, to the present day.

In recognition of such need, six provincial and territorial Human Rights Acts now prohibit discrimination on the basis of some version of political beliefs including:

-	B.C.	s.6,8,9	political belief;
-	Man.	s.9(2)	political belief, political association or political activity;
-	Nfld.	s.7(1)	political opinion;
-	P.E.I.	s.13	political belief;
-	Que.	s.10	political convictions;
-	Yukon	s.5(j)	political belief, political association or political activity.

The following rationale for such a proscribed ground is included in the 1988 Annual Report of the Canadian Human Rights Commission:

> The Commission is of the view that political belief should be included as a proscribed ground of discrimination because differentiation on this basis infringes the freedoms of opinion, speech and association [as safeguarded in section 2(c) of the Charter]. The Commission recognizes that a delimitation of the scope of this ground will be necessary, and that there may be a need for specific exceptions in relation to certain kinds of government appointments.[144]

The inclusion of such a protection could militate against impugned forms of discrimination; concurrently, the legislation could enable exceptions to be made with respect to bona fide requirements of political belief or affiliation.

To date, there are few judicial decisions which address this particular matter. In *Aymong v. Le College St-Jean-sur-Richelieu*,[145] a professor claimed that she was dismissed on the bias of political convictions. The Court decided against her, holding that her intransigent Marxist views prevented her from properly educating her students on a broader spectrum of political thought.

The Province of P.E.I. has recently amended its Human Rights Code to revise an earlier definition of "political belief". The Supreme Court of Prince Edward Island had struck down a provision that tied the definition to the Provincial Elections Act. The Executive Director of the P.E.I. Commission has reported that a number of persons have filed complaints under the previous and the present provisions (which, in any event, applies to previously filed complaints). He has also reported the successful resolution of a significant percentage of earlier complaints.[146]

In its June 12, 1989 submission, the New Brunswick Federation of Labour noted that:

> it (the Federation) has also passed many convention resolutions in support of political rights. In 1981, it requested that the Public Service Labour Relations Act, section 34(2) stating that "the Board shall not certify as bargaining agent for bargaining unit any employee organization, who receives money for activities on, by or on behalf of any political party", be deleted because it violates the Human Rights Act. Other resolutions requested that the right of public employees to participate in political activities be recognized.[147]

The New Brunswick Advisory Council on the Status of Women and the Federation of New Brunswick Faculty Associations have also expressed general support for such a provision.

RECOMMENDATIONS:

4.49 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of political belief.

4.50 It is recommended that with respect to discrimination on the basis of political belief, the Lieutenant-Governor in Council, on the recommendation of the New Brunswick Human Rights Commission, make regulations to establish the criteria for establishing a bona fide exception with respect to this prohibition.

8) Seizure of Pay

Sections 9 and 11(1) of the Newfoundland Human Rights Code stipulate that no one shall harass an occupant or discriminate in employment because of garnishment of a person's wages. This provides appropriate protection for people who have incurred civil liability for debt.

RECOMMENDATION:

4.51 It is recommended that consideration be given to the inclusion in the New Brunswick Charter the prohibition of discrimination on the basis of seizure of pay.

9) Sexual Orientation

At the outset, it is noted that twelve individuals and organizations submitted written recommendations for the inclusion of a provision in the New Brunswick Statute to prohibit discrimination on the basis of sexual orientation. The arguments advanced for such protection are summarized in the following words of the New Brunswick Coalition for Human Rights Reform:

> An estimated 50,000 adult New Brunswickers are homosexual or bisexual. We are a vital part of our society, but we are continuously subjected to discrimination and hatred. Heterosexist discrimination forces most us, at tremendous personal cost, to disguise our sexual orientation to survive. It denies us the jobs, housing and public services that we are entitled to as citizens, taxpayers and voters.
>
> The Canadian Charter of Rights and Freedoms implicitly guarantees equality without regard to sexual orientation, but it does not provide an effective remedy. Accordingly, we ask that sexual orientation be explicitly included among the grounds of prohibited discrimination listed in the Human Rights Act. This is already the case in Ontario, Quebec, Manitoba and Yukon.
>
> Such an amendment would prohibit discrimination against heterosexuals, homosexuals and bisexuals in employment, housing and public services. It would enable the Human Rights Commission to investigate cases of discrimination and conciliate or refer them to arbitration. It would help combat homophobic and heterosexist attitudes. Yet it would not entail any increase in funding.
>
> Such an amendment is supported by the New Brunswick Human Rights Commission and by public opinion. It also has the support of many prominent organizations, including the New Brunswick Advisory Council on the Status of Women, the Canadian Labour Congress, and the Canadian Psychological Association. Such amendments have been supported by a number of political parties, including the Liberal Parties of Canada, Ontario and Manitoba. Many churches, employers and Human Rights Commissions also oppose discrimination based on sexual orientation.
>
> An amendment to the Human Rights Act is urgently needed so that we may have the same rights as the rest of society.[148]

In the documentation accompanying its brief, the Coalition cited 28 organizations that have supported the inclusion of this provision in the New Brunswick legislation. Those who made such a recommendation to this inquiry included the New Brunswick Advisory Council on the Status of Women, the Premier's Council on the Status of Disabled Persons, the New Brunswick Association of Occupational Therapists, the Federation of New Brunswick Faculty Associations, the New Brunswick Federation of Labour and the Atlantic Human Rights Centre.[149]

Presently, four jurisdictions include "sexual orientation" as a prohibited ground of discrimination: Manitoba, Ontario, Quebec and the Yukon. The Canadian Human Rights Commission has repeatedly recommended the inclusion of this ground in the federal Act. The terminology "sexual orientation" is accepted by spokespersons for the homosexual community, who say that nothing is to be gained by more explicit terminology. The Quebec Human Rights Commission has defined this inclusion broadly as "including the behaviour generated by this tendency".[150]

The inclusion of such protection has extended the right of homosexuals to equal treatment. In one decision,[151] an employee was granted bereavement leave in order to attend the funeral of his partner's father. In Johnston v. Rochette,[152] a Quebec court struck down a provision in a separation agreement which prohibited a lesbian mother from gaining access to her children while her lesbian partner was present.

The author of an Ontario study on human rights concluded that "there can be no doubt that (homosexuals) suffer from frequent and extensive discrimination because of their sexual orientation ... which is part of their private life."[153] This includes dismissal from employment, harassment, and even violence. The advent of the AIDS epidemic has undoubtedly aggravated this discrimination. As noted above, an ancillary and important part of protecting homosexuals from discrimination is the express inclusion of 'AIDS' as an example of disability prohibited by the statute.

Mr. S. Ronald Stevenson, the author of the Newfoundland Human Rights Code Study, concluded that "the adoption of the Charter ... entrenched the values of liberty, tolerance and equality [which] ... dictate the protection of Canada's homosexual community."[154] The author of a comparable Ontario study said that the ability to discriminate against homosexuals with impunity is "deplorable".[155] The 1988 Annual Report of the Canadian Human Rights Commission reasoned that a powerful case can be made that discrimination on the basis of sexual orientation is already prohibited by section 15 of the Charter. "[If so], it could be anomalous, to say the least, if it were not among the grounds enumerated" in human rights statutes.[156]

In response to concerns of the inclusion of sexual orientation under our Code, the fundamental role of human rights legislation in the protection of unpopular minorities should be stressed.

> Members of groups that are particularly vulnerable to arbitrary deprivation of their human rights and freedoms because of characteristics for which they are not

> responsible and which they are not in a position to change ... are usually considered to be entitled to special measures ... to protect their welfare.[157]

With respect to the important question of public attitudes, it is noteworthy that Professor Fletcher's Survey indicates that 65% of respondents believed that "for the most part, local ordinances that guarantee equal rights to homosexuals in such matters as job and housing uphold the Canadian human rights for all".[158] Similarly, 67.4% of the "citizen group" and 80.1% of the "elite group" would approve "a law allowing lesbian mothers the rights to be granted custody of the children in a divorce, if the court finds her otherwise capable of taking care of the children".[159] The same survey indicates that approximately 50% of the respondents would approve of allowing homosexuals to teach school in the respondent's province. It is noted that a significantly less favourable response from police respondents was also reflected in the relatively neutral response that this inquiry received from the Atlantic Association of Chiefs of Police.[160]

Finally, it is arguable that the decision in the Andrews case that citizenship was a ground of discrimination analogous to the expressly prohibited grounds under the Charter would hold equally true with respect to sexual orientation.

RECOMMENDATION:

4.52 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of sexual orientation.

10) Social Condition, Social Origin

The prohibition against discrimination on the basis of 'social condition' is an encompassing term currently used only in Quebec. Section 7 of the Newfoundland Code prohibits discrimination on the basis of what would appear to be the subsumed head of 'social origin'.

The Quebec Courts have held that social condition includes: a) Past convictions - Mercier c. Ville de Beauport;[161] b) Receipt of welfare - Veronneau c. Bessette;[162] Fournier v. Poisson;[163] c) Social rank - Lauzon c. Le Centre Hospitalier St-Vincent de Paul de Sherbrooke.[164] In the Lauzon case, social condition was defined as the ensemble of all circumstances of a person's birthplace, education, and resources that place him or her in a certain position in society.

In Fournier c. Poisson,[165] it was noted that, because "social condition" is a "catch-all" term, whether or not it can be demonstrated depends upon the circumstances of each case. Thus, it is arguable that if a bank refuses to grant a loan to a person without resources, this is not discrimination, but only good business practice. Conversely, if an employment competition favours a person because of their high social echelon, this would discriminate against equally capable people from lower social echelons.

Such an encompassing term may be valuable in that it would provide a ground of discrimination that could be used in the case of a legitimate complaint that fell under no other specific head. It is almost as broad as the general prohibition against discrimination found in section 9 of the Manitoba Code and in section 15 of the Charter. However, such a general "prohibition" may be a preferable legislative choice to a "catch-all" term such as this.

RECOMMENDATION:

4.53 It is recommended that consideration be given to the inclusion of social condition or social origin as a prohibited ground of discrimination in the New Brunswick Charter.

11) Source of Income

Four jurisdictions prohibit discrimination on the basis of "source of income". However, "source of income" usually refers specifically to "receipt of public assistance". The terminology employed by the respective jurisdictions includes:

Man.	s.9(2)	source of income [applies to occupancy only];
N.S.	s.11D	income payments from government or maintenance payments;
Ont.	s.2	receipt of public assistance;
Que.	s.10	social condition.

Since there is no jurisprudence from Manitoba, Ontario and Nova Scotia to elaborate on the meaning of these terms, only Quebec decisions provide guidance. In Veronneau c. Bessette,[166] the court held that the denial of accommodation to a welfare recipient constituted discrimination on the basis of social condition. However, in Samson c. L'Equipe du Formulaire Lt. Inc.,[167] the court held that receipt of social welfare is not the equivalent of social condition.

There is an important distinction to be noted in the decision whether to include such a ground. Such a protection does not appear to prevent an inquiry about a person's ability to pay; rather, it prohibits only the ability to inquire about the source of a person's ability to pay.

The New Brunswick Advisory Council on the Status of Women has made the following recommendations with respect to discrimination on the basis of source of income:

> [TRANSLATION] It is a well-known fact that recipients of financial assistance have problems finding adequate, affordable housing. Many landlords refuse to rent living accommodations to these people because of the source of their income.
>
> This form of discrimination could be prohibited by including source of income as an outlawed reason for discrimination. Including source of income and family status would provide parents receiving financial assistance with some recourse in the areas of housing, public services, and employment.[168]

RECOMMENDATION:

4.54 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of "source of income".

D) Related Discriminatory Practices

1) Associates' Trait

This comprehensive provision - presently found in the Codes of Manitoba, Nova Scotia, Ontario, P.E.I. and the Yukon - helps to ensure that the objects of the legislation will not be circumvented in an instance where one suffers discrimination because of the association with another person or group that is subject to discrimination.

Section 6 of the Yukon Human Rights Code provides perhaps the best phraseology with respect to such a provision:

> 6. It is discrimination to treat any individual or group unfavourably on any of the following grounds: ...
>
> (1) actual or presumed association with other individuals or groups whose identity or membership is determined by any of the groups listed in paragraphs (a) and (k).

RECOMMENDATION:

4.55 It is recommended that the New Brunswick Charter prohibit discrimination on the basis of actual or presumed association with an individual or a group that is subject to a proscribed form of discrimination.

2) Harassment

Section 7.1 of the New Brunswick Code provides a comprehensive prohibition of sexual harassment. As noted above, this provision has probably been rendered redundant by the Supreme court of Canada's decision in the Janzen[189] case.

Nevertheless, the inclusion of such a provision has merit from the perspectives of education and clarity. More importantly, an extended definition of "harassment" would probably equate with a perceived result of the Janzen case; i.e., that harassment with respect to any prohibited ground of discrimination is discrimination under a human rights code.

Six Canadian jurisdictions, including the Federal government, Manitoba, Newfoundland, Ontario, Quebec and the Yukon, have extended the protection from harassment to other grounds of discrimination. In Newfoundland and in Ontario, this is done by a series of provisions that extend the protection to other fields of activity under a broad range of grounds of discrimination. The other four jurisdictions have enacted a single provision applicable to all fields of activity and grounds of discrimination under their respective codes. For example, Quebec's section 10.1 states: "No one may harass a person on the basis of any ground mentioned in section 10". For purposes of clarity and interpretation, it is suggested that Manitoba's comprehensive section 19 serve as a model for the legislative incorporation of such protection.

RECOMMENDATION:

4.56 It is recommended that the New Brunswick Charter prohibit harassment with respect to all fields of activity and grounds of discrimination in a similar manner to that provided under section 19 of the Manitoba Code.

3) Hate Literature

Section 13 of the Canadian Human Rights Act provides that

> 13.(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
>
> (2) Subsection (1) does not apply in respect of any matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.
>
> (3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

As a result of a meeting and follow-up correspondence with Mr. Neil Finkelstein, the Legal Counsel to the Atlantic Jewish Council and the Canadian Jewish Congress, the following recommendation was made with respect to the inclusion of a section 13-type of protection in our New Brunswick Charter.

> As to whether the orientation and scope of the current law is appropriate to address problems and expectations, in my view the current New Brunswick legislation is a good start but it does not go far enough. There should be a clear statement similar to the anti-hate propaganda provision in section 13 of the Canadian Human Rights Act which prohibits statements which are likely to bring a person into hatred or contempt on the basis of certain prohibited grounds. This lack of a proscription against group defamation is, in my opinion, the most serious omission in the New Brunswick legislation (and, in fact, in the legislation of other provinces as well) and should be corrected.[170]

The inclusion of such a provision would be consistent with the requirement contained in Article 20 of the U.N. International Covenant on Civil and Political Rights that

> 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

The Atlantic Human Rights Centre has identified the major reservation with respect to this question:

> [W]hile the problem of hate literature, which is an ongoing problem in the province, must be taken seriously, we are aware of the absolute necessity to protect the freedom of speech and freedom of expression. We do not wish to imply that any law should be set in place which violates these freedoms in any way.[171]

RECOMMENDATION:

4.57 It is recommended that further study and consideration be given to the inclusion of a provision in the New Brunswick Charter similar to section 13 of the Canadian Human Rights Act, which would properly balance the right to be free from group defamation with the right to free speech.

4.58 It is recommended that the New Brunswick Charter prohibit publicity that encourages any violation of its provisions (as in section 12 of the Canadian Human Rights Act).

4) Reprisal

Section 8 of the New Brunswick Human Rights Code provides that:

> 8. No person shall discharge, refuse to employ, exclude, expel, suspend, deny, evict or otherwise discriminate against any person because he has made a complaint or given evidence or assisted in any way in respect of the initiation, inquiry or prosecution of a complaint or other proceeding under this Act.

All other provincial and territorial Codes also prohibit discrimination on the ground of previous complaint initiation. For example, the Alberta Individual Rights Protection Act states, in section 11, that:

> No person shall evict, discharge, suspend, expel, [intimidate, coerce, impose a ... penalty on] or otherwise discriminate against a person because that person has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Act.

Section 14 of the Nova Scotia Act and section 15 of the P.E.I. Act are identical except that they do not include the bracketed terminology. Section 20 of the Manitoba Act is somewhat more detailed. It lists seven behaviours - each involving the assistance or initiation of complaint resolution - with respect to which reprisal is prohibited. It also lists future behaviours that are protected from reprisal. For example, one cannot threaten to cause a detriment to a person on the ground that a person may testify in a proceeding. Ontario's congruent section 7 phrases this protection differently: "Every person has a right ... to enforce his or her rights under this Act ... without reprisal". Quebec's section 83.1 also protects groups who "take part" in investigations.

There is no question that this protection is a valuable one. Moreover, it is possible that the New Brunswick statute would be strengthened by the adoption of the more comprehensive language contained in section 20 of the Manitoba Code.

RECOMMENDATION:

4.59 It is recommended that the New Brunswick Charter prohibit reprisal in a manner similar to section 20 of the Manitoba Code.

DISCRIMINATION: FIELDS OF ACTIVITY UNDER STATUTE - COMPARATIVE TABLE - ( ) EXCEPTIONS ARE IN PARENTHESIS

TABLE 4A	FED	N.B.	ALTA	B.C.	MAN.	NFLD.	N.S.	ONT.	P.E.I.	QUE.	SASK.	N.W.T.	Y.T.
EMPLOYMENT - (EMPLOYMENT BY EMPLOYER; EMPLOYERS' ORGANIZATION; OTHER PERSON)	7 (15)	3(1) (3(5)-(7))	7(1),7(1.1) (7(2),7(3), 9,11.1)	8(1),8(2) (8(3) 8(4))	14(1), 14(2) (14(7)-(12))	10(1), 11(1) (4,10(6), 11(5))	3,8(1), 11A-C (8(4), 11B(3) 11C(2))	4,22 (10-18, 23-4)	6(1) (6(4), 11,14)	16 (20)	9,16(1) (16(4)-(7))	3(1),3(2) (13)	6,8 (9,10)
- EMPLOYMENT AGENCY	-	3(2) (3(5)-(7))	-	-	-	10(2), 11(2) (4,10(6), 11(5))	8(2), 11A-C (8(4), 11B(3) 11C(2)	4,22(4) (10-18, 23-4)	6(2) (6(4),11, 14)	18 (20)	16(2),16(3) (16(4)-(7))	-	-
- TRADE UNION OR EMPLOYERS' ORGANIZATION	9(1),10 (9(2),15)	3(3) (3(5)-(7))	10 (11.1)	9	14(6) (14(7)-(12))	10(3), 11(3) (4,10(6), 11(5))	3,9 11A-C (11B(3) 11C(2))	5 (10-18)	8 (11,14)	-	18	3(4) (13)	6,8 (9.10)
- EMPLOYMENT APPLICATION OR ADVERTISING	8 (15)	3(4) (3(5)-(7))	8(1) (2(3), 8(2),9, 11.1))	6	14(3), 14(4), 14(5), (14(7)-(12))	10(4), 11(4) (4,10(6), 11(5))	8(3), 11A-C (8(4), 11B(3), 11C(2))	4,22 (10-18, 22(3), 23-4)	6(3) (6(4),11, 14)	18.1 (20)	19	3(3) (13)	6,8 (9,10)
COMMERCIAL OR DWELLING UNIT OCCUPANCY	6 (15(g))	4(1) (4(4))	4(5,11.1)	5(1) (5(2))	16(1) (16(2))	8(1) (4,8(2))	5(1), 11A-D (5(2),11B(3) 11C(2), 11D(2))	2 (10-18,20)	3(1) (3(2),5.1 ,11,14)	12,13 (14,20)	11(1) (11(2), 11(3))	4(2) (13)	6,8 (9,10)
TRANSFER OF PROPERTY	-	4(2)	-	4	17	-	3,6,11A-C (11B(3), 11C(2))	-	4 (5.1,11,14)	13 (20)	10(1), (10(2))	-	6,8 (9,10)
- RESTRICTIVE COVENANT	-	4(3)	-	4	-	-	7	-	5 (5.1,11,14)	-	-	-	-
ACCOMMODATION, SERVICES, FACILITIES (OR GOODS)	5 (15)	5(1) (5(2))	3 (11.1)	3	13(1) (13(2))	7(1) (4,7(2))	3,4,11(1) 11A-C (11(2), 11B(3), 11C(2))	1 (10-19,21)	2(1),10(1) (2(2), 10(2),11, 14)	12,15 (20)	12(1) (12(2), 12(3))	4(1) (13)	6,8 (9,10)
PUBLICATON OF NOTICE, SIGN, SYMBOL, ETC.	12 (15)	6(1) (6(2)-(3))	2(1) (11.1,2(2), 2(3),11.1)	2(1) (2(2))	18	15(1) (4,15(2))	12(1) (12(2)	12(1) (12(2), 10-18)	12(1) (11,12(2), 14)	11	14(1) (14(2))	5(1), (5(2),13))	-
OCCUPATIONAL (PROFESSIONAL, BUSINESS, TRADE) ASSOCIATION MEMBERSHIP	-	7(1) (7(2))	-	-	-	-	3,10, 11A-C, (11B(3), 11C(2))	5 (10-18)	9 (11,14)	17 (20)	17	-	6,8 (9,10)
CONTRACTS	-	-	-	-	15(1) (15(2))	-	-	3 (10-18,21)	-	13 (20)	-	-	6,8 (9,10)

GROUNDS OF PROSCRIBED DISCRIMINATION IN N.B. CODE - COMPARATIVE TABLE

TABLE 4B	FED	N.B.	ALTA	B.C.	MAN.	NFLD.	N.S.	ONT.	P.E.I.	QUE.	SASK.	N.W.T.	Y.T.
RACE	3-14	3-7	2-4,7,8,10	2-9	9	7-10,15	3-11, 12,12A	1-8	1-12	10-18.1	9-19	3-5	6,8
COLOR	3-14	3-7	2-4,7,8,10	2-9	9	7-10,15	3-11 12,12A	1-8	1-12	10-18.1	9-19	3-5	6,8
RELIGION/CREED	3-14	3-7	2-4,7,8,10	2-9	9	7-10,15	3-11 12,12A	1-8	1-12	10-18.1	9-19	3-5	6,8
NATIONAL/ETHNIC ORIGIN	3-14	3-7	-	-	9	7-10,15	3-11 12,12A	1-8	1-12	10-18.1	-	3-5	6,8
PLACE OF ORIGIN	-	3-7	2-4,7,8,10	2-9	-	-	-	1-8	-	-	9-19	3-5	-
ANCESTRY	-	3-7	2-4,7,8,10	2-9	9	-	-	1-8	-	-	9-19	3-5	6,8
AGE	3-14	3-7	2,7,8,10	6,8,9	9	10	11B,12	1-8	1-12	10-18.1	10,14, 17-19	3-5	6,8
PHYSICAL DISABILITY	3-14	3-7	2-4,7,8,10	2-9	9	7-10,15	11B,11C,12	1-8	1-12	10-18.1	9-19	3-5	6-8
MENTAL DISABILITY	3-14	3-7		2-9	9	7-10,15	11B,11C,12	1-8	1-12	10-18.1	9-19	3-5	6,8
MARITAL STATUS	3-14	3-7,	7,10	2-9	9	7-10,15	11A,11AB, 12	1-8	1-12	10-18.1	9-19	3-5	6,8
SEX	3-14	3-7	2-4,7,8,10	2-9	9	7-10,15	11A,12	1-8	1-12	10-18.1	9-19	3-5	6,8

PROHIBITED GROUNDS OF DISCRIMINATION NOT FOUND IN N.B. CODE - COMPARATIVE TABLE

TABLE 4C	FED	N.B.	ALTA	B.C.	MAN.	NFLD.	N.S.	ONT.	P.E.I.	QUE.	SASK.	N.W.T.	Y.T.
CRIMINAL CHARGE/RECORD OF CONVICTION/PARDON	3(1)-14	-	-	8,9	-	-	-	4	-	18.2	-	3-5	6,8
FAMILY STATUS	-	-	-	-	9	-	-	1-5	-	10-18.1	-	3-5	6,8
LANGUAGE/LINGUISTIC ORIGIN	-	-	-	-	-	-	-	1-5	-	10-18.1	-	-	6,8
NATIONALITY/CITIZENSHIP	-	-	-	-	9	-	-	1-5	-	-	9-19	3-5	-
PLACE OF RESIDENCE	-	-	-	-	-	-	-	-	-	-	-	3(2)	-
POLITICAL BELIEF	-	-	-	6,8,9	9	7-10,15	-	-	1-13	10-18.1	-	-	6,8
SEIZURE OF PAY	-	-	-	-	-	9A,9A1,11		-	-	-	-	-	--
SEXUAL ORIENTATION	-	-	-	-	9	-	-	1-5	-	10-18.1	-	-	6,8
SOCIAL CONDITION/ SOCIAL ORIGIN	-	-	-	-	-	7-10,15	-	-	-	10-18.1	-	-	-
SOURCE OF INCOME	-	-	-	-	9	-	11D	2(1)	-	-	-	-	-

RELATED DISCRIMINATORY PRACTICES - COMPARATIVE TABLE

TABLE 4D	FED+	N.B.*	ALTA*	B.C.	MAN.	NFLD.	N.S.*	ONT.	P.E.I.*	QUE.	SASK.	N.W.T.*	Y.T.
ASSOCIATES' TRAIT	-	-	-	-	-	-	12A	11	13	-	-	-	6,8
HARASSMENT	14	7.1	-	-	19	9,13,14	-	2(2), 4(2),6	-	10.1	-	-	13
HATE LITERATURE	13	-	-	-	-	-	-	-	-	-	-	-	-
REPRISAL	-	8	11	20	20	16	14	7	15	49	45	3(5)	28

* Prohibited forms of discrimination also set out in preamble.
+ Prohibited forms of discrimination also set out in legislative purposes clause.

END NOTES

1. [1989] 1 S.C.R. 143 at 162.

2. Ibid. at 164.

3. Ibid. at 174.

4. Ibid. at 174-5.

5. Ibid. at 173.

6. Marc Gold, "A principled Approach to Equality Rights: a Preliminary Inquiry", (1982) 4 Supreme Court Law Review, pp. 131 at 140.

7. [1989] 1 S.C.R. 143.

8. Ibid. at 152-3.

9. Appendix D-11.

10. a) Employment; including employment notices/advertisements. (The word 'notices' is broader.)

    b) Rental of premises, or lease or room, or tenancy premises, or the broadest terms of either accommodation or occupancy, or sale of land.

    c) Transfer or purchase of property, which might be subsumed under the heading of contracts.

    d) Public services, accommodation, facility or goods. (Man. s.13(1) gives a very detailed list of what could fall into this category.)

    e) Publications or notices.

    f) Vocational association (this seems to be a superior wording to that of 'membership in association' or 'union or organization'.)

    g) Contracts.

Federal

s.2	This legislative purposes section lists all grounds
s.3(1)	repeats all these grounds, calling them prohibited grounds
s.5	goods, services, facilities on a prohibited ground
s.6	accommodation on a prohibited ground
s.7	employment on a prohibited ground
s.12	notices on a prohibited ground

Alberta

An entire list of prohibited ground is in the preamble.

No discrimination in

s.2(1)	notices on grounds listed in preamble of characteristics that person or class of persons
s.3	accommodation on grounds listed in preamble of that person or class of persons or any other class of persons
s.4	tenancy on ground listed in preamble of that person or class of persons
s.7	employment practices listed in preamble of that person or class of persons or any other class of persons

British Columbia

No discrimination in

s.2	publications 'in any manner prohibited in this act'
s.3	public facilities, accommodations on list of grounds
s.4	purchase of property on list of grounds
s.5	tenancy premises
s.6	employment advertisements on list of grounds adding political belief
s.8	employment on list of grounds adding 'political belief and conviction or summary conviction charge that is unrelated to employment'.

Manitoba

s.9(2)	All prohibited grounds are listed and described with some detail.
s.13(1)	public services, accommodation, facility, etc.
s.14(1)	employment
s.15(1)	contracts
s.16(1)	rental of premises

Nova Scotia

A list of some prohibited grounds is in the preamble.

No discrimination in

s.3	public services, facilities on same list
s.4	access to services on same list
s.5	accommodation on same list
s.6	sale of property on same list
s.7	contract on same list
s.8	employment on same list

No discrimination based upon other grounds are then noted thus

s.11A	sex or marital status
s.11B	age or physical or mental disability
s.11D	maintenance payments

s.12	association

Newfoundland

No discrimination in

s.7	public services, facilities on listed grounds
s.8	occupancy on same listed grounds
s.10	employment on same listed grounds
s.15	publications on same listed grounds

Ontario

The list of grounds varies slightly in each venue.

No discrimination in

s.1	services on list of grounds
s.2	accommodation on list of ground adding receipt of public assistance
s.3	contracts on list of grounds
s.4	employment on list of grounds adding record of offences
s.5	vocational association on list of grounds

P.E.I.

An entire list of prohibited grounds is in the preamble.

No discrimination in

s.2(1)	public accommodation, service or facilities
s.3	occupancy
s.4	property sales
s.6	employment
s.8,9	union or organization membership

Quebec

s.10	All prohibited grounds of discrimination listed

No discrimination in

s.12	goods or services ordinarily offered to the public
s.14	lease of room
s.15	public places
s.16	employment adding penal offence to grounds in s.18(2)
s.17	associations

Saskatchewan

No discrimination in

s.10	purchase of property on listed grounds
s.11	accommodation on same listed grounds

s.12 public services or facilities on same listed grounds
s.14 publications on same listed grounds
s.15 making of contracts on same listed grounds
s.16 employment on same listed grounds
s.17 membership in associations on same listed grounds

Yukon

s.6 All prohibited grounds listed
s.8 no discrimination in
  (a) services, goods or facilities available to public
  (b) employment
  (c) membership in trade association
  (d) occupancy or sale of property
  (e) contracts

11. The texts of all the New Brunswick human rights enactments are set out in Appendix C.

12. *Re Minister of Labour et al.*, Court of Appeal of New Brunswick, Sept. 8, 1989 (unreported).

13. Ibid. at 16, citing *Ontario Human Rights Commission* v. *Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536 at 546-7.

14. Ibid. at 17, citing *Robichaud* v. *Canada (Treasury Board)* [1987] 2 S.C.R. 84 at 89.

15. John I. Laskin, "Section 15 of the Charter and Human Rights Legislation" in *Equality: Section 15 and Charter Procedures* (Law Society of Upper Canada; Toronto, March, 1985), p. C-3.

16. See footnote 10 supra.

17. W.A. Tarnopolsky & W.F. Pentney *Discrimination and the Law* (Don Mills: DeBoo, 1985) at 2-2.

18. Exceptions under Canadian human rights statutes

a) General

- reasonable and justifiable contravention of Act (Alta., s.11.1)
- bona fide and reasonable requirement; bona fide and reasonable cause (Man., s.14(4); s.13(1), s.18, s.16(1), s.14(6), s.15(1))
- bona fide requirement, justification or consideration or discrimination authorized by Act (Ont., s.10)
- refusal, limitation, specification or preference based on a bona fide qualification (P.E.I., s.14(1))
- an exception respecting a bona fide aptitude or qualification (Que., s.20)
- factors establishing reasonable cause for discrimination (Yukon, s.9(d))
- membership and function of non-profit religious, charitable, educational, social, cultural, philanthropic, political or education institution or organization (Ont., s.15(2) (incl. trade union); Que., s.20; Yukon, s.10(1))

- age, citizenship, disability and family status, discrimination (Ont, s.14, 15(1), 16; Yukon, s.10(2))

b) Employment

- refusal, limitation, specification, preference based on bona fide occupational qualification (b.f.o.q.) - (N.B., s.3(5); Alta., s.7(3); B.C., s.8(4); Nfld, s.10(1); P.E.I., s.6(4))
- bona fide and reasonable requirement or qualification (Man., s.14(1); Sask., s.16(7) - sex, disability, age; N.W.T., s.13(3); Yukon, s.9(a))
- employment agency - b.f.r. - (Man., s.14(5))
- employment advertising (Alta, s.8(2); B.C., s.6; Man., s.14(3); Nfld., s.10(4); Ont., s.22(3))
- non-profit, religious, charitable, educational, social, cultural, political or athletic organization (Nfld., s.10(6); N.S., s.8(4); Ont., s.15(2); P.E.I., s.6(4); Que., s.20; Sask., s.16(5); N.W.T., s.13(1); Yukon, s.10(3).
- terms or conditions of bona fide retirement, superannuation or pension plan - including minimum service requirement - or group or employee insurance plan. (Fed., s.15; N.B., s.3(6); Alta., s.7(2); B.C., s.8(3); Nfld., s.10(5); N.S., s.11B(3); Ont., s.24; P.E.I., s.11; Que., s.20; Sask., s.16(4))
- employee benefit plan - regulation - (Man., s.14(7))
- age including normal requirement age (Fed., s.9(2), 14(c)); minimum and maximum age by law (Fed., s.14(b); Man., s.14(10))
- bona fide seniority scheme (B.C., s.8(3); Sask., s.16(4))
- citizenship re Chief or senior executive (Ont., s.15(3))
- criminal charge, conviction or record (B.C., s.8, 9; Que., s.18.2; Yukon, s.9(b))
- disability (N.B., s.3(7); N.S., s.11 C(2))
- wage attachment discrimination (Nfld., s.11(1), 11(5))
- bona fide pre-employment inquiry (Man., s.14(4))
- discipline of employee for discrimination (Man., s.14(11)
- compliance not to result in termination, benefit reduction or change in customs, conditions or practices or employment (Man., s.14(12))
- place of residence (Nfld., s.4(3))
- maternity or child-birth leave (Fed., s.15(f))
- person employed in private home of employer (Alta., s.9 - or employee "resident in" (Man., s.14(8); Nfld., s.10(6), 11(1); N.S., s.8(4); N.W.T., s. 13(1))
- medical or personal attendance to relative (Ont., s.23)
- private home (Yukon, s.10(3)(a))
- nepotism - spouse, child or parent of employer or employee (Ont., s.23)

c) Occupancy

- bona fide justification for denial or differentiation (Fed., s.15(g))
- bona fide limitation, specification, exclusion, denial or preference re sex, disability or marital status discrimination (N.B., s.4(4); Alta., s.9; Nfld., s.8(2) - disability only)
- bona fide and reasonable cause (Man., s.16(1))
- shared sleeping, bathroom or kitchen accommodation (B.C., s.5(2), 110(2); Que., s.14; Yukon, s.10(3)(b))
- sex re respect for privacy (Ont., s.20(2); Yukon, s.9(c)); multiunit occupancy (P.E.I., s.3(2); Sask., s.11(2)); duplex or smaller owner occupied unit (Sask., s.10(2))

d) Transfer of Property

- bona fide and reasonable cause (Man., s.17)
- statutory age exception (Sask., s.10(2))

e) Accommodation, Services, Facilities or Goods

- bona fide justification for denial or differentiation (Fed., s.15(g))
- bona fide limitation, specification, exclusion, denial or preference re sex, disability or marital status (N.B., s.5(2); Nfld., s.7(2))
- bona fide and reasonable cause (Man., s.13(1))
- functions of institution established for persons subject to discrimination (Ont., s.17; P.E.I., s.14(1); Que., s.20; N.W.T., s.13(1))
- educational facility (Nfld., s.4(2); Ont., s.18; Sask., s.13(2); N.W.T., s.13(2))
- volunteer association (N.S., s.11(2); P.E.I., s.10(2))
- insurance (B.C., s.3 - sex or disability; Man., s.15(2) - regulations re bona fide and reasonable exceptions)
- age (Man., s.13(2) - age of majority on act; P.E.I., s. 2(2); Sask., s.12(3) - statutory age)
- sex re public decency (B.C., s.3; Ont., s. 19(1); Sask., s.12(2))

f) Discriminatory Publication

- free speech (N.B., s.6(2); Alta., s.2(2); B.C., s.2(2); Nfld., s.15(2); N.S., s.12(2); Ont., s.12(2); P.E.I., s.12(2); Sask., s.14(2); N.W.T., s.5(2)
- bona fide limitation, specification, exclusion, denial or preference re sex, disability or marital status (N.B., s.6(3))
- bona fide and reasonable cause (Man., s.18)
- publicity of facilities used by one sex (Alta., s.2(3); P.E.I., s.14(1))
- publicity of non-profit religious or ethnic organization (Alta., s.2(3); P.E.I., s.14(1))

g) Occupational Association Membership

- Canadian or British citizenship (N.B., s.7(2))
- bona fide and reasonable cause (Man., s.14(6))

h) Contract

- bona fide and reasonable cause (Man., s.15(1))
- legal instrument made before coming into force of Act (P.E.I., s.14(1))
- local preference (Nfld., s.4(3))

19. [l982] 1 S.C.R. 202.

20. W.S. Tarnopolsky and W. Pentney Discrimination and the Law (Toronto: DeBoo, 1985), at 10-17.

21. [1989] 1 S.C.R. 143.

22. See footnote 18 supra.

23. Appendix D-37.

24. The Canadian Human Rights Benefit Regulation (S.O.R. 80/68) under the Canadian Human Rights Act is a good example of this approach.

25. [1988] 2 S.C.R. 293.

26. Ibid. at 307.

27. [1982] 1 S.C.R. 202.

28. Ibid. at 220.

29. [1985] 2 S.C.R. 561.

30. Ibid at 589.

31. [1989] 1 S.C.R. 143 at 175-6.

32. [1985] 2 S.C.R. 536.

33. Ibid. at 658.

34. [1987] 1 S.C.R. 1114.

35. Ibid. at 1139.

36. S.C. 1986, c. 31.

37. S.N.B. 1989, c. P-5.01.

38. Appendix D-35.

39. Appendix D-17.

40. Appendix D-30.

41. Appendix D-30.

42. Ibid.

43. Appendix D-15.

44. Andrews at 172.

45. Ibid. at 175.

46. Appendix D-26.

47. Appendix D-14

48. Dr. Joseph Fletcher, Summary of Survey Results Prepared for the New Brunswick Office of the Ombudsman (Toronto: University of Toronto, July, 1989). The full text of Dr. Fletcher's Survey is set out in Appendix G to this Report.

49. Canadian Human Rights Foundation Summer Workshop, Charlottetown, P.E.I., July 17, 1989.

50. Black's Law Dictionary, 5 ed. (St. Paul, U.S.A.: West Publishing Co., 1979) p. 1132.

51. Webster's New Collegiate Dictionary (Springfield, U.S.A.: G & C Merriam Co., 1977) p. 42.

52. Clare Beckton, "Section 27 and Section 15 of the Charter" in Multiculturalism and the Charter: A Legal Perspective, Canadian Human Rights Foundation, (Agincourt, Carswell, 1987) pp. 1-15.

53. N.B., Policy on Multiculturalism (Fredericton, Queen's Printer, 1986). The full text of this Policy is in Appendix D-26.

54. Mr. Whalen's research paper is set out in full as Appendix F.

55. Black's Law Dictionary, 5 ed. (St. Paul, U.S.A.: West Publishing Co., 1979) at 1161.

56. Ibid. at 333.

57. Appendix G.

58. Sonnenburg v. Lang et Centre Universitaire Saint-Louis-Maillet; Daigle, J. (C.Q.B.N.B.) (unreported), Sept. 19, 1989.

59. (1988) 49 D.L.R. (4d) 687.

60. (1988) 21 B.C.L.R. (2d) 165 (C.A.).

61. Appendix D-38, p. 3.

62. Ibid. at 6.

63. Ibid. at 18.

64. Appendix D-18. This concern was echoed by the Premier's Council on the Status of Disabled Persons (Appendix D-31).

65. Defence for Children International (Geneva, Switzerland, 1988).

66. (1988), 46 D.L.R. (4d) 193.

67. (1988) 49 D.L.R. (4d) 687.

68. 21 B.C.L.R. (2d) 165 (C.A.).

69. (1988), 55 D.L.R. (4d) 408.

70. (1988) 46 D.L.R. (4d) 193 at 245.

71. Ibid. at 250.

72. R.S.B.C. 1979, c. 176, s.5.

73. 21 B.C.L.R. (2d) 165 (C.A.) at 171.

74. Ibid., at 172-73.

75. Ibid., at 173.

76. Ibid.

77. Ibid.

78. [1985], 1 S.C.R. 177.

79. Ibid., at 218-219.

80. 21 B.C.L.R. (2d) 165 (C.A.) at 174.

81. Sniders v. Nova Scotia (Attorney General) (1988), 55 D.L.R. (4th) 408 at 411-12.

82. Ibid., at 415.

83. Ibid., at 426.

84. Ibid. at 427, citing Dickson, C.J.C. in R. v. Oakes [1986] 1 S.C.R. 103.

85. Ibid. at 427.

86. Ibid. at 428, citing Stoffman v. Vancouver General Hospital (1988), 49 D.L.R. (4th) 727 at 736.

87. Prof. John McEvoy, 'Work and Retirement', at the Conference on Human Rights and Aging, University of New Brunswick, September 23, 1989. The assistance of Madeleine Driscoll, L.L.B. is also acknowledged.

88. Appendix D-25.

89. Appendix D-15.

90. Appendix G.

91. Andrews v. Law Society of British Columbia [1989], 1 S.C.R. 143 at 175.

92. Lepofsky and Bickenbach: 'Equality, the Charter and disabled Canadians' 5 Just Cause No. 4, pp. 11-14.

93. Prof. Donald Poirier "Legal Protection of the Elderly in Relation to Economic and Physical Abuse", a presentation given at the Conference on Human Rights and Aging University of New Brunswick, September 23, 1989.

94. Biggs. v. Hudson 9 C.H.R.R. D/5391.

95. Appendix D-1.

96. Evidence of David Lepofsky to the Standing Committee on the Status of Disabled Persons, House of Commons, Issue No. 14, p. 9.

97. "Disabled are locked out of jobs..." André Picard, The Globe and Mail, February 16, 1989 citing Income Insecurity: The Disabled Income System in Canada, G. Allen Rocher Institute, 1989.

98. (1985), 39 Sask. R. 81 (Sask. C.A.).

99. Evidence of David Lepofsky to the Standing Committee on the Status of Disabled Persons, House of Commons, Issue No. 14, p. 7.

100. O'Malley and Ontario Human Rights Commission v. Simpsons-Sears Ltd. [1985] 2 S.C.R. 536.

101. Forget v. (Attorney General) Quebec, [1988] 2 S.C.R. 90 at 103.

102. Bhinder v. Canadian National Railway Co. [1985] 2 S.C.R. 561.

103. Canada. Canadian Human Rights Commission, Special Report to Parliament on the Effects of the 'Bhinder' decision on the C.H.R.C., February, 1986, p. 4.

104. Appendix D-7.

105. Appendix D-31.

106. Appendix D-6.

107. 'Equality for All' Report of the Parliamentary Committee on Equality Rights (Ottawa: Queen's Printer, October 1989.)

108. (1988), 62 O.R. (2nd) 588 (District Court).

109. Ibid. at 595, citing R.S.O. 1980, c. 484.

110. S.N.B. 1989, c. 23.

111. Schaap and Lagacé v. Canadian Armed Forces (1988). 9 C.H.R.R. D/4890.

112. (1988) 9 C.H.R.R. D/5106.

113. (1987), 8 C.H.R.R. D/3699.

114. Brooks v. Canada Safeway Ltd. [1989] 1 S.C.R. 1219.

115. Ibid. at 1221.

116. Janzen v. Platy Enterprises Ltd. [1989] 1 S.C.R. 1252.

117. Ibid. at 1253.

118. Appendix D-22; D-25.

119. R.S.N.B. 1973, c. M-1.1.

120. See, for example, the 18th Annual Report of the New Brunswick Ombudsman, 1984, p. 2-3.

121. McCartney v. Woodward Stores Ltd. (1982), 3 C.H.R.R. D/1113.

122. Ibid. at D/1120.

123. Tarnopolsky and Pentney at 9-55, 9-56.

124. Appendix D-22.

125. Appendix D-20.

126. Council of Europe, European Treaty Series no. 5.

127. Handbook of Existing Rules pertaining to Human Rights in the Inter-American System, OEA/ser. L/V/11.60, Sept. 1, 83, pp. 31-58.

128. S.A.N.B. v. Minority School Board No. 50 [1986] 1 S.C.R. 549. This S.C.C. decision is discussed on pp. 8-11 of Appendix F.

129. This is the opinion of Dr. Noel Kinsella interviewed for this work.

130. R.S.N.B. 1973, c. O-0.1 (Bill 88)

131. S.C. 1988, c. 38.

132. Clare Beckton, "Section 27 and Section 15 of the Charter" in Multiculturalism and the Charter a Legal Perspective, Canadian Human Rights Foundation, Carswell: Agincourt, 1987, pp. 1-15.

133. Appendix F at 52-3.

134. Ibid. at 66-7.

135. Webster's 9th New Collegiate Dictionary (Springfield, U.S.A.: Merriam-Webster, Inc. 1986) p. 788.

136. Ibid. at 243.

137. [1989] 1 S.C.R. 143.

138. Appendix D-15; letter from Mr. Paul LeBreton, Deputy Attorney General, to Prof. Constantine Passaris, Chair, N.B.H.R.C., May 29, 1989.

139. McDermott v. Nackawic (Town) (1988), 53 D.L.R. (4th) 150 (N.B.C.A.).

140. Telephone conference between C. Ferris and Mr. E. D. Smith (N.W.T. Government), August 2, 1989.

141. The Fredericton Daily Gleaner, Dec. 17, 1988, p. 9.

142. New Brunswick, Synoptic Reports of the Legislative Assembly (Fredericton, Queen's Printer) 1967, v. 1, p. 278ff; 1971; VIV, p. 1523.

143. Ibid., 1967, v.1, p. 282.

144. Canada, Annual Report of the Canadian Human Rights Commission (Ottawa: Queen's Printer, 1988) p. 52.

145. (1980) 1 C.H.R.R. D/85.

146. Appendix E.

147. Appendix D-25.

148. Appendix D-24.

149. Appendix D.

150. J. Bergeron, "New Categories in Quebec Analyzed" (1980) 1 C.H.R.R. c/17, 18 cited in Tarnopolsky and Pentney at 9-50.

151. (1989) 10 C.H.R.R. D/6064.

152. (1982), 3 C.H.R.R. D/1133.

153. Ontario Human Rights Commission; "Life Together: A Report on Human Right in Ontario" (Toronto: Queen's Printer, 1977) p. 82.

154. S. Ronald Stevenson, "The Newfoundland Human Rights Code: Recommendations for Amendment"; (Ottawa: Secretary of State, 1985) p. 95.

155. Op. cit. at 82.

156. Canada, Annual Report of the Canadian Human Rights Commission (Ottawa: Queen's Printer, 1988) p. 15.

157. United Nations, The United Nations and Human Rights (New York: The United Nation 1984) p. 109.

158. Appendix G.

159. Ibid.

160. Appendix D-2.

161. (1981) 3 C.H.R.R. D/648 (C.P.).

162. (unreported) C.P. 750-32-001640-78, 1979.

163. (1980) 1 C.H.R.R. D/15.

164. C.S. 450-05-00856-78, 1978.

165. Op. cit.

166. (unreported) C. P. 750-32-001640-78, 1979.

167. (1982) 3 C.H.R.R. D/1141 (C.P.).

168. Appendix D-22.

169. Janzen v. Platy Enterprises Ltd. [1989] 1 S.C.R. 1252.

170. Appendix D-4.

171. Appendix D-2.

CHAPTER FIVE

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CHAPTER FIVE

Procedure under the New Brunswick Charter of Rights and Freedoms

I. Introduction

The protection of the substantive rights and freedoms in the New Brunswick Charter will depend, to a great extent, on the effectiveness of the procedures adopted to ensure such protection. This Chapter addresses the complaint procedure from both the administrative and legislative perspectives keeping in mind the need for a balance between the twin ideals of speedy justice and administrative or procedural fairness. The administrative and legal responses recommended herein endeavour to secure a procedural regime which assures broad flexibility and discretion tempered by procedural certainty and fairness. Mindful of both the immense importance of the rights advanced and the need to maximize scarce public resources, the report recommends adequate legal protections for the Commission and boards of inquiry, with a broader access to judicial review. An underlying objective of those recommendations is that the quality and dedication of individual human rights officers may attain fuller expression within this proposed structure.

II. A Structural Response to the Competing Objectives of Speedy Justice and Procedural Fairness

Throughout the course of this work, the refrain has echoed that some means must be found to obtain a speedier resolution of complaints. The perception shared by practitioners and other experts is that it is easiest to resolve a human rights complaint at the time an allegation of discrimination arises. The passage of time, it is argued, results in a hardening of positions followed by resort to more formal legal procedures.

However, it is also recognized that Canadian statutory human rights agencies must respond to complaints in a careful and thorough manner in order to ensure that all parties receive fair and even-handed treatment.

The quest for a complaint-handling mechanism that best strikes a balance between these competing objectives must address questions relating to the adequacy of the present complaint-handling mechanism, the adequacy of staff resources, and the extent to which procedural safeguards must be respected.

There is a general perception that the New Brunswick Commission has the necessary investigative and conciliative skills to expeditiously "effect a settlement" of the complaints that are lodged with it. Its statistics and those of Canada's eleven other statutory human rights agencies indicate that the majority of public contacts are responded to without resort to the formal complaint mechanisms provided under the statutes. Furthermore, the majority of complaints that are handled formally appear to be resolved in a reasonably expeditious manner.

The Secretary General of the Canadian Human Rights Commission has noted somewhat discouragingly that it takes years to fully process a complaint from filing of completed complaint form to the completion of a board of inquiry.[1] A similar concern emanated from the Quebec and Ontario Commissions.[2] However, those Commissions which report a more expeditious complaint handling procedure (e.g., Alberta, British Columbia) have been accused of soft peddling the rights, including procedural rights, which are afforded to groups that have traditionally been subject to discriminatory practices.[3] In New Brunswick, it has been argued that some celebrated human rights complaints have evolved into complex, expensive and time consuming legal proceedings through a lack of integrity in the complaint procedure established under the provincial legislation.[4]

Some responses received by this inquiry state that the Commission's investigative functions sometimes demonstrate shortcomings in investigative skills and a lack of respect for procedural prerequisites.[5]

With respect to the first of these two issues, the Commission's two Directors - Ms. Janet Cullinan and Ms. Karen Taylor - have determined that the amelioration of staff investigative and other relevant professional skills is a high priority.[6] They have also (jointly or individually) indicated that they consider the following factors to be very relevant to the quality of their service: a) the level of training and experience of intake workers, human rights officers and legal counsel; b) skills levels in conciliation/alternative dispute resolution methodology; c) the extent to which educational and investigative functions are separated, and d) the extent of utilization of a team approach to problem solving through case conferencing and consultation/referral vis-à-vis other investigative bodies. Ms. Cullinan and Ms. Taylor have pointed out that these factors must be addressed in light of the limited human resources available to the Commission.[7]

While it is inappropriate to offer conclusions with respect to a qualitative analysis of the above factors, it is recommended that such an analysis be completed by the Commission as part of an assessment of the relationship between its human resources and the goals of the organization.

It is suggested that the reasonably detailed "Reports" of Canadian provincial statutory human rights agencies in Appendix E[8] and the responses provided by groups and individuals in Appendix D[9] may assist in such an exercise.

Paralleling the need for a fast, efficient and economical investigative function is the belief that the New Brunswick Human Rights Commission must be respectful of the principles associated with due process. This respect is especially significant in view of the fact that the Commission is charged with the administration of a near constitutional document.

Section 7 of the Canadian Charter of Rights and Freedoms states that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Provincial human rights commissions must ensure that they accord fundamental justice both to complainants and to all those persons who are investigated or charged for alleged non-compliance with the legislation. It is generally recognized that fundamental justice is comprised of the rights to be told of the case made against one's self, the right to an unbiased adjudicator, and the right to a fair hearing.[10]

Mr. Justice Beetz in the Singh[11] case, noted that "the most important factors in determining the procedural content of fundamental justice, in a given case, are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned."[12]

Two proposals are made with respect to the type of mechanism that will best complement the work of a well-trained and dedicated staff and respect the prerequisites of administrative fairness.

First, it is recommended that the complaint handling and promotional functions of the Commission be kept separate, except insofar as the former acts as a resource or mere disseminator of information with respect to the latter. While it is possible that the outstanding characteristics of dispassionate investigator and evangelizer of human rights may be found in a single person, it is suggested that it is more likely that these distinct gifts are possessed by different persons.

Second, it is recommended that, within the investigative function, the roles of investigator and conciliator ought to be combined initially if the result of an expeditious and timely resolution is to be achieved. If such a result is not achieved, it is recommended as appropriate that another member of the intake/investigator/ legal counsel team intervene in an effort to effect a complaint resolution. Such a recommendation assumes that the persons who execute each of these three functions have completed formal and informal training in conciliation/alternative dispute resolution techniques.

By these measures, the Legislature may ensure that the procedures of the Commission conform with the principles of fundamental justice guaranteed by the Charter. Yet, the Commission may also be a speedy and relatively inexpensive means for resolving complaints, and one which takes account of financial constraints.

RECOMMENDATIONS:

5.1 **It is recommended that expediency of complaint resolution be retained as a preeminent objective of the New Brunswick Human Rights Commission.**

5.2 **It is recommended that the objectives of expediency of and integrity within the Commission's complaint-handling procedure be met by maintaining, but redefining, the compliance and educational/ promotional functions.**

5.3 **It is recommended that the Commission further develop a complaint response structure that combines the roles of investigator and conciliator upon receipt of a complaint in order to effect speedy settlement.**

5.4 **It is recommended that, upon non-settlement at the receipt level within a relatively fixed period of time, the roles of investigator and conciliator be assigned to two different human rights officers who, in a given investigation, may assume the role of investigator or conciliator, but not both.**

5.5 It is recommended that the role of receipt officer be assumed by human rights officers on a rotational basis or by persons hired for such a specific receipt function.

5.6 It is recommended that the implementation of a toll-free telephone service, facsimile service and fast mail be considered as means to facilitate the complaint procedure.

5.7 It is recommended that the present emphasis on staff training be continued and increased, by participation in conciliation/alternative dispute resolution training and more traditional learning formats, with particular emphasis on intensifying the Commission's participation in the training initiatives of the Canadian Association of Statutory Human Rights Agencies (CASHRA) and the Canadian Human Rights Foundation.

III. Legislative Characteristics of the Complaint Procedure under the New Brunswick Charter

A) Complaint Investigation

1) Complaint Initiation

a) Standing

Section 17 of the New Brunswick Human Rights Code provides that:

> Any person claiming to be aggrieved because of an alleged violation of this Act may make a complaint in writing to the Commission in a form prescribed by the Commission.

In assessing the adequacy of this complaint initiation procedure, one must respond to several questions:

> Can a complaint be initiated by a legal person, such as a corporation, or only by an actual individual?
>
> Can a complaint be initiated by a group of persons, as in a class action suit in the civil arena?

> Can a complaint be filed on behalf of a child by a parent or guardian and, if so, need this be made explicit in view of the ability to make such a complaint of common law and in view of the Commission's practice to accept such complaints?

The question of who has standing to bring a complaint can be an ambiguous issue and one with important implications. Obviously, the aggrieved person may bring a complaint. It may be advisable to allow any person to complain on behalf of the aggrieved (perhaps conditional upon the consent of the aggrieved). Some provinces give standing to any person who has reasonable grounds for believing a person has contravened the Act. This practice may be impractical since it could allow for voluminous complaints and might invite nuisance complaints. An exception to this latter consideration might be the explicit allowance of complaint initiation by any organization dedicated to the protection of human rights.

One important question is whether or not the Commission should be allowed to initiate its own complaints. If so, an ancillary question arises: should such complaints be restricted to systemic problems or extend to both individual and systemic matters? There does seem to be merit in adopting an issue-driven mechanism which would allow the Commission to institute proceedings to resolve particular strategic issues. Through a planned and precise issues strategy, particular forms of discrimination may be more effectively addressed than is presently possible under a "complaint driven" procedure. Such a procedure exists at the federal level through the congruence of the Canadian Human Rights Act and the Employment Equity Act. Obviously, such an enlargement of the mandate of the Commission would require commensurate resources.

The Human Rights Evaluation completed by the New Brunswick Department of Labour and Multiculturalism concluded that:

> The analysis of program rationale with respect to the social milieu in which it operates reveals the need to recognize through action collective as well as individual responsibility to take the initiative to ensure redress for discrimination.[13]
> Moreover, the departmental report recommended that:
>
> Further consideration and study be given to amending the legislative mandate of the Commission to permit a more pro-active role by virtue of provisions for i) Commission initiated complaints in areas such as hate literature, and advertisements for employment where there is no single victim and ii) for class action complaints which address collectively, systemic discrimination.[14]

In relation to complaints initiation, there are four options:

Option 1 Only the aggrieved person may bring a complaint.

N.B., s.17; P.E.I., s.21; N.W.T., s.7; Yukon, s.19.

Option 2 Either the aggrieved person or the Commission may bring a complaint.

N.S., s.23(a),(b)
Ont., s.31(1),(2) but the Commission may initiate a complaint at the request of any person, which makes this resemble Option 3.

Option 3 Either the aggrieved person, or any person on behalf of the aggrieved where the aggrieved gives consent, or the Commission or its executive director may bring a complaint.
Fed. s.40 (includes any person or group of persons on behalf of aggrieved);
Man., s.22(1),(2),(3);
Sask., s.27(1),(2),(3) (the Commission has the discretion to decide to proceed if the aggrieved person does not give consent).

Option 4 Either the aggrieved person, or any person who has reasonable grounds for believing a person has contravened the Act.

Alta., s.9(1) explicitly precludes Commission from making complaint.
B.C., s.11
Nfld., s.21
Que., s.74 - by individual, group or organization - dedicated to the protection of human rights.

It should also be noted that standing to apply for a Charter remedy "is granted to anyone who makes a plausible claim that his/her rights have been infringed or denied. The section contemplates that it is the applicant's rights which have been infringed or denied; it does not authorize an application in respect of someone else's rights, let alone the generalized rights of a good citizen".[15] However, the Borowski[16] case says that anyone with a "genuine interest" may seek a remedy.[17] This broad enunciation of standing is, again, justifiable by analogy to criminal law under which anyone may complain of a violation because an infringement of the criminal law is seen to be of fundamental importance to the community at large. Human rights, too, have this connection to fundamental community values and, for this reason, any member of the community should be entitled to make a complaint, unless the person directly affected by a violation of the New Brunswick Charter does not wish the complaint to be made.

Quite apart from the question of standing to bring a complaint before the Commission is the issue addressed by section 35 of the Newfoundland Code, namely, the right "to lay a complaint before a court of summary jurisdiction (The Trial Division of the Supreme Court) for an alleged contravention of or failure to comply with the Act..." The inclusion of such a provision would address the concerns of those who are not prepared to accept the notion of an 'independent' administrative tribunal - in particular, those whose concerns relate to alleged wrongful government activity. In New Brunswick, such a procedural choice presently obtains under the Right to Information Act.[18]

It is noted that the submission by the New Brunswick Federation of Labour[19] recommended the legislation provide for a Commission-initiated complaint. Moreover, both the New Brunswick Women's Institute[20] and the New Brunswick Advisory Council on the Status of Women[21] recommended that the legislation accommodate group complaints.

It is concluded that the broad latitude given to 'standing' under the Canadian Charter ought to be emulated in our Code.

RECOMMENDATIONS:

5.8 **It is recommended that any person, group, association or corporation have standing to complain to the Commission on their own behalf or on behalf of another person (including a minor) with respect to a prohibited form of discrimination.**

5.9 **It is recommended that the Commission - including its executive director - have standing to make a complaint on its own motion.**

5.10 **It is recommended that the Commission have the authority to require that the consent of a person be obtained prior to the commencement of an investigation.**

5.11 **It is recommended that a person be able to initiate a complaint before a judge of The Court of Queen's Bench of New Brunswick.**

b) Form of Complaint

Section 17 of the New Brunswick Human Rights Code provides that "any person ... may make a complaint in writing to the Commission in a form prescribed by the Commission". This language suggests that complaints filed in other than the stipulated written form may be accepted. A similar format exists in:

-	Fed.,	s.40(1)	may file ... a complaint in a form acceptable to the Commission.
-	B.C.,	s.11(1)	...a complainant may file a complaint.
-	Ont.,	s.31(1)	...a person may file with the Commission a complaint in a form approved by the Commission.
-	Que.,	s.74	Any person ... may file a complaint ... complaint must be in writing.

In most other Canadian jurisdictions, a complaint may be initiated in only one manner - the filing of a written complaint on the Commission's complaint form. Section 22(4) of the Manitoba Act is an example: "Every complaint shall be filed in the form prescribed by regulations made by the Commission." Similar provisions are found in: Alta., s.19(1); Nfld., s.21; N.S., s.23(a); P.E.I., s.21; Que., s.32(1) and Sask., s.27(1).

The requirement that a person file a written complaint may discourage disabled or illiterate people from filing legitimate complaints. This concern was expressed by the Canadian National Institute for the Blind,[22] the Premier's Council on the Status of Disabled Persons[23] and the Commission's Legal Counsel.[24] The thrust of their arguments is that, while there is a need for legal certainty which is served by a written complaint form, there is also a concern that the Commission might inadvertently fail to respect the equality of dignity of all persons who complain to it.

Another reservation that is expressed respecting the legal or administrative requirement of a written complaint form is its possible impact on the perceived workload of the Commission. Presently, the New Brunswick Human Right Commission receives over 1,700 informal complaints annually.[25] Many of these complaints are resolved without the requirement of a written complaint; however, under the present administrative regime, only 160 formal written complaints enter into the Commission's statistics. This appears to be neither a fair nor accurate reflection of the Commission's work nor, more particularly, the efficacy of its investigative function.

RECOMMENDATIONS:

5.12 It is recommended that the New Brunswick Charter provide that the Commission may require that a complaint be in writing.

5.13 It is recommended that a complaint form be written in plain, everyday language; and as much as possible in other formats such as braille which will accommodate the individual needs of persons making the complaint.

5.14 It is recommended that the New Brunswick Charter provide that the Commission may receive complaints in other forms and/or media than a written form.

c) Time Limit

There is presently no time limit for lodging a complaint under the New Brunswick Act. Six jurisdictions impose such a limit, including: Alta., s.19 (6 months); Man., s.23 (6 months); Nfld., s.21 (6 months); P.E.I., s.21 (12 months); Que.,s.32(1) (12 months); and Yukon, s.19(2) (6 months).

A time limit is appropriate, it is argued, because the passage of time reduces the reliability of evidence and the accessibility of witnesses. There is also a belief that a respondent should not have to deal with the allegation of a long-past wrong. A one-year time limit would apparently represent a balance of these competing objectives.

While it is both rational and administratively attractive to impose a limitation period, it is also important that there be some means by which an exceptional circumstance may be accommodated. Section 23 of the Manitoba Code provides a model to meet these objectives. On the one hand, it imposes (per s.23(1)) a six-month time limit for the lodging of a complaint; on the other (per s. 23(2)), it enables the executive director to extend the time for complaining unless "he or she is satisfied that the extension would cause undue prejudice to the respondent".

RECOMMENDATIONS:

5.15 It is recommended that the New Brunswick Charter establish a one-year time limit for the making of a complaint.

5.16 It is recommended that the New Brunswick Charter provide that the Commission or its executive director may extend this time limit so long as the extension would not cause undue prejudice to a respondent.

2) Investigative Powers

Until 1988, section 19 of the New Brunswick Human Rights Code vested broad investigative powers in the Commission. In that year, the provision was amended by the passage and application of the Entry Warrants Act to investigations conducted by the Commission. This legislation provides that the somewhat more defined entry powers under section 19 may only be exercised after the Commission has obtained a judicial designation of an investigator, including a confirmation of the conferral of entry powers under the section.

The Table below sets out the scope of investigative powers conferred on other Canadian human rights agencies. It is noted that, at the outset of the description of such powers, there is sometimes a general provision such as section 22 of the P.E.I. Code: "The Commission in the investigation of a complaint or other process under this Act may require any person to furnish any information or records that may be necessary to further the investigation or process".

Table 5A - Investigative Powers of the Commission

Power to enter a place other than a dwelling	Fed., s.43; Alta., s.21(a); Man., s.27(1); Nfld., s.23(1) -"during work hours"; N.S., s.24(b); Ont., s.32(3)(a).
Requirement of production of documents	Alta., s.21(b); B.C., s.12(b); Man., s.27(1); Nfld., s.23(1); N.S., s.24(a); Ont., s.32(3)(b).
Power to question a person	B.C., s.12(a); Nfld., s.23(1)(c); Ont., s.32(3)(d) - subject to right to counsel; P.E.I., s.22.
Warrant for search for documents	Fed., s.43; Alta., s.22(3); Man., s.27(2); Nfld., s.23(3); N.S., s.24A(1); Ont., s.32(7); P.E.I., s.23(1).
Warrant for entry	Fed., s.43; Alta., s.22(3); Nfld., s.23(3); N.S., s.24A(1); Ont., s.32(7); P.E.I., s.23(1).
Power to obtain assistance of peace officer	Man., s.27(4)

By virtue of the 1989 amendments to the Quebec Charter, the broad inquiry powers vested in the Commission have been removed to the new Tribunal (s.112), while the former is vested only with a duty to "seek ... any evidence" necessary to carry out its curtailed function.

An important limitation is also noted in both the Alberta (s.20(1)) and Newfoundland (s.22(2)) Codes, namely, that the Commission must give notice of the exercise of its powers to the person who is the subject of a complaint.

The New Brunswick Code suggests that judicial authorization must be obtained in every complaint-related inspection. On the other hand, the new section 28.1 of the Saskatchewan Code provides that such authorization need only be obtained where a person refuses to cooperate with an investigation by the Saskatchewan Commission.

While it may be appropriate to scrutinize the powers exercised under a human rights statute of 'near constitutional' proportions, the seemingly more sensible provisions of the Saskatchewan Code might better serve the overall purposes of the statute.

RECOMMENDATION:

5.17 **It is recommended that the present provision contained in section 19 of the New Brunswick Human Rights Code be amended to conform with a provision similar to section 28.1 of the Saskatchewan Code.**

3) Complaint Settlement

Section 18(1) of the New Brunswick Code requires the Commission to 'endeavour to effect a settlement of the matter complained of'. Moreover, the conferral of Conciliation Board powers on a board of inquiry may be seen as related to the same objective. As set out below, such an express or implied provision is part of the administration of each Canadian statutory human rights agency:

Table 5B - Complaint Settlement by the Commission

Fed.	s.48	A settlement shall be referred to CHRC for approval or rejection.
N.B.	s.18(1)	NBHRC shall endeavour to effect a settlement; board of inquiry has powers of a conciliation board.
Alta.	s.20(1)	AHRC shall endeavour to effect settlement; regulation re settlement.
B.C.	s.14	Council may recommend a settlement.

Man.	s.29(2)	MHRC may mediate to settle complaint; MHRC shall terminate proceedings if settlement reached or reasonable offer made by respondent.
Nfld.	s.22, 24	NHRC shall endeavour to effect settlement; approval of settlement by Commission; further investigation on non-compliance; necessity of NHRC approval.
N.S.	s.23, 26A(5)	NSHRC shall endeavour to effect settlement; board of inquiry shall report terms of a settlement.
Ont.	s.42	Signed agreement approved by Commission is binding; breach of agreement is ground for complaint.
Que.	s.62, 79	QHRC may endeavour to effect settlement; settlement shall be in writing.
Sask.	s.28(1)-(3)	SHRC shall endeavour to effect settlement; is a necessary party to settlement; may publicize settlement results; regulation re settlement.
N.W.T.	s.7(2)	Officer shall endeavour to effect a settlement.
Yukon	s.20	After investigation, the Commission shall try to settle on terms agreed by parties; regulation re settlement.

As the efficient and expeditious settlement of complaints is critical to the integrity of a human rights agency, it is appropriate that its settlement powers should be of a comprehensive nature.

RECOMMENDATIONS:

5.18 It is recommended that the New Brunswick Charter incorporate explicit settlement provisions, modelled after those found in section 42 of the Ontario Code.

5.19 It is recommended that the New Brunswick Charter provide that the Commission be empowered to publish the results of a settlement.

4) Complaint Dismissal

Section 18(2) of the New Brunswick Code provides that the Human Rights Commission may dismiss a complaint at any stage of proceeding on finding that the complaint is without merit.

It is important that the New Brunswick Commission retain the power to dismiss a complaint after it has completed a preliminary review. Any diminution of this power would result in the reduction of the efficacy with which legitimate complaints are resolved. On the other hand, there is also merit in setting out in more explicit fashion the bases upon which a complaint may be rejected.

Such a provision would prevent duplication of proceedings, and perhaps encourage complainants to utilize other dispute resolution venues, e.g., the Employment Standards Act complaint procedure. Combined with the limitation period, a power to dismiss would also reduce the pursuit of old complaints.

The following Table sets out the grounds upon which Canada's statutory human rights agencies may reject a complaint:

Table 5C - Bases for Complaint Dismissal by the Commission

Without merit	N.B., s.18(2); Alta., s.20(4); Man., s.29(1); Sask., s.27(4).
Other more appropriate forum	Fed., s.44; B.C., s.13(1)(b); Ont., s.33(1); Que., s.77(4).
Outside jurisdiction	Fed., s.44; B.C., s.13(1)(a); Ont., s.33(1).
Trivial, frivolous, vexatious made in bad faith	Fed., s.44; B.C., s.13(1)(c); Man., s.29(1); Ont., s.33(1); Que., s.77(3).
Beyond stated time limit	Fed., s.44; B.C., s.13(1)(d); Ont., s.33(1); Que., s.77(1).
Insufficient interest	Que., s.77(2).

[Nfld., N.S. and P.E.I. Acts are silent.]

RECOMMENDATIONS:

5.20 It is recommended that the New Brunswick Charter provide that the Commission may dismiss a complaint if in its opinion it:

- **a) will more readily be dealt with in another forum;**
- **b) is outside its jurisdiction;**

c) is trivial, frivolous, vexatious or made in bad faith;

d) is made beyond the time limit recommended above;

e) is based on conduct respecting which an exemption would have been granted, even if such an exemption was not granted at the time of the conduct;

f) is otherwise, for reasons stated by the Commission, without merit.

5.21 It is recommended that the New Brunswick Charter provide that the Commission shall give written reasons, including a summary of the facts upon which such reasons are based, with respect to the dismissal of any complaint.

5) Procedural Fairness

a) Fairness to Complainant

It is important that a person who initiates a complaint is satisfied that the complaint is disposed of in a fair and accountable fashion. In Radulesco v. Human Rights Commission (Can.),[26] the Supreme Court of Canada established the following minimum procedural standards that must be met in the disposition of a complaint by a Canadian statutory human rights agency:

> a) The Commission must act on a quasi-judicial basis when it decides to dismiss a complaint as unsubstantiated. This may require that a quorum of the Commission dismiss the complaint. It surely demands an impartial and thorough preliminary investigation of the validity of the complaint. It may also require that the complainant be notified in writing of the decision and the reasons for it.
>
> b) It must also provide the complainant with an opportunity to make a submission, at least in writing, before any action is taken on the basis of an investigation's report, although a hearing is not necessarily required.
>
> c) The Commission must disclose the case against the respondent in this report in order to ensure that the complainant's submissions are made on an informed basis.

The New Brunswick Commission has subsequently taken steps to ensure that it meets these minimum standards; however, it is appropriate that they should receive formal recognition through statutory (including regulatory) enactment.

b) Fairness to Respondent

As pointed out in the Singh case (supra),

> "the fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to proceedings or prosecutions or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it."[27]

This test suggests that the following procedures ought to be incorporated into the New Brunswick Charter:

a) When the Commission decides to investigate a complaint, it will send a letter of notice to the respondent within a stated number of days advising of the nature of the complaint and of a pending investigation;

b) At the beginning of an investigation, the investigating officer shall advise the respondent of the nature of the investigation and of the possible results of such an investigation. (The respondent may be given the name of the investigator and a copy of the legislation);

c) At the conclusion of an investigation, the respondent will be sent the report of the investigation, and requested to make further submissions.

d) The respondent will be provided with an opportunity to make a written submission to the report before any action is taken on the report by the Commission.

Sections 23, 25 and 28 of the Manitoba Code illustrate the types of provisions that establish such procedural safeguards:

> s.23(1) Subject to subsection (2), every complaint shall be filed within six months of the alleged contravention of the Code or, where a continuing contravention is alleged, within six months of the last alleged instance of the contravention.
>
> s.23(2) The executive director may extend the time for filing any complaint except a complaint filed under subsection 22(3), but the executive director shall not extend the time if he or she is satisfied that the extension would cause undue prejudice to the respondent.

> s.23(3) Within 30 days of the filing of a complaint, the executive director shall cause the respondent to be served with a copy of the complaint, but failure to meet the 30 day time limit does not invalidate the complaint.
>
> s.25 The respondent may file, at an office of the Commission, a written reply to the complaint.
>
> s.28 Upon completion of the investigation into a complaint and prior to (its) disposition, the complainant and the respondent have the right to be informed of the findings of the investigation and the right to respond to the investigator in respect of those findings.

RECOMMENDATION:

5.22 It is recommended that the New Brunswick Charter incorporate provisions to ensure that procedural fairness is extended to the complainant(s) and the respondent(s) throughout the complaint procedure.

B) Board of Inquiry

1) Initiation of a Board of Inquiry

Presently, the initiation of a board of inquiry occurs in the manner set out in s.20(1) of the New Brunswick Code:

> s. 20(1) If the Commission is unable to effect a settlement of the matter complained of, the Minister may, on the recommendation of the Commission, appoint a Board of Inquiry composed of one or more persons to hold an inquiry to investigate the matter and to forthwith communicate the names of the members of the Board to the parties referred to in paragraphs (4.1)(a),(b) and (c) and thereupon it shall be presumed conclusively that the Board was appointed in accordance with this Act.

A substantially similar procedure is followed in Alberta, (s. 27(1)); Nova Scotia, (s.25(1)); P.E.I., (s.24(1)); Saskatchewan, (s.29(1)), and Ontario (s.37).

In both Manitoba (s.31) and Newfoundland (s.24(3)), a board of inquiry may be established after an act of non-compliance with a pre-existing complaint resolution or settlement as well as in the circumstances set out above.

The Newfoundland Act makes a noteworthy innovation in s.22(4). If the Commission declines to refer a complaint to a board of inquiry, the complainant may apply to the Trial Division of the Newfoundland Supreme Court for an order that the Commission refer the complaint to a board of inquiry.

Several questions must be addressed with regard to the selection of a board of inquiry. Who should choose "the Board"?; a representative of the Commission?; an independent third party?; a minister of the Crown and, if so, a minister of a particular authority? Should the person who makes the choice draw upon a list? If so, who would compile the list? Should names be drawn from this list in the order in which the names are added to the list, in random order or according to particular areas of expertise of panel members?

The most important consideration in this regard is to ensure that the decision-maker(s) chosen to sit on an inquiry be of the best possible quality. This would ensure that the parties' rights were being adjudicated upon in the fairest and most impartial fashion possible. Fairness and impartiality would enhance public confidence in the inquiry and forestall allegations of bias.

The Quebec Legislature has adopted a modified version of such a judicial model during its 1989 legislative sitting. As set out in its Explanatory Notes[28], "the bill contains various provisions concerning the establishment, operation and administration of the Human Rights Tribunal, including a provision stating that the Tribunal will be presided over by a judge of the Court of Quebec"[29].

The Federal (s.38.1), Manitoba (s.8) and Newfoundland (s.25, 26) statutes provide for both Human Rights Tribunal panel, and Adjudication Panels. These bodies are comprised of Cabinet-appointed panel members who are selected on a rotating basis (Fed. and Man.) or at the discretion of the Chief adjudicator (Nfld.) to conduct inquiries under the respective statutes.

The British Columbia statute is somewhat unique in that, while it provides for the appointment of a board of inquiry by the Minister, no Board has been appointed since the legislation was passed in 1984. Rather, a three-person committee of the Council of Human Rights decides whether an unresolved complaint has sufficient merit to proceed to a hearing and subsequently appoints another Council member to conduct a hearing. In this sense, the Council operates in a way analogous to that of a board of inquiry.[30]

An option that has not been fully explored is that of designating a judge of the Court of Queen's Bench of New Brunswick as a board of inquiry under the Human Rights Code. Such an option would be justified on the basis of the independence and expertise of the judiciary as well as the financial resources that are presently committed to this function. This option should receive serious consideration if the appointing authority is not prepared to appoint boards of inquiry comprised of persons who possess particular expertise in matters of human rights, administrative law or other related disciplines.

Regardless whether one opts for a judicial inquiry or an adjudication panel appointed by the Lieutenant-Governor in Council, it is entirely consistent with the independence and impartiality sought for this process that the person who appoints a board of inquiry be required to do so at the instance of the New Brunswick Human Rights Commission.

RECOMMENDATIONS:

5.23 **It is recommended that the New Brunswick Charter provide for the appointment of a panel of adjudicators, comprised of a chief adjudicator and ten adjudicators.**

5.24 **It is recommended that the panel members be selected by the Lieutenant-Governor in Council on the basis of a history of familiarity with and sensitivity to human rights issues.**

5.25 **It is recommended that the selection of particular adjudicators to a board of inquiry be made by the chief adjudicator on a rota basis at the instance of the New Brunswick Human Rights Commission.**

5.26 **It is recommended that the fees to be paid to a board of inquiry adjudicator be fixed by regulation.**

5.27 **It is recommended that, as in section 22(4) of the Newfoundland Code, when the Commission declines to refer a complaint to a board of inquiry, the complainant be empowered to apply to the Court of Queen's Bench of New Brunswick for an order that the Commission refer the complaint to a board of inquiry.**

2) Parties to a Board of Inquiry

Under the New Brunswick Code (s.20(4.1), the parties to a Board of Inquiry are:

a) the Commission;
b) the person named in the complaint as the complainant;
c) any person named in the complaint who is alleged to have violated this Act; and
d) any other person as may be determined by the Board.

As the following Table indicates, this provision is similar to that found in most other Canadian jurisdictions. The major exception is that five jurisdictions specifically provide that the Commission shall have carriage of the complaint.

Table 5D - Parties to a Board of Inquiry

Commission	Fed., s.50(1); N.B., s.20(4.1); Alta., s.29(1); Man., s.34; Nfld., s.27(1); N.S., s.26; Ont., s.38(2); P.E.I., s.25(1); Sask., s.30(1).
Complainant	Fed., s.50(1); N.B., s.20(4.1); Alta., s.29(1); B.C., s.16(3); Nfld., s.27(1); N.S., s.26; Ont. s.38(2); Sask., s.30(1).
Respondent	Fed., s.50(1); N.B., s.20(4.1); Alta., s.29(1); Man., s.34; N.S., s.26; Ont., s.38(2); Sask., s.30(1).
Any other party added by the Board	Fed., s.50(1); N.B., s.20(4.1); Alta., s.29(1); B.C., s.16(3) Man., s.34; Nfld., s.27(1); N.S., s.26; Ont., s.38(2); Sask., s.30(1).
Carriage by Commission	Alta., s.29(1); Man., s.34; Nfld., s.27(1); Ont., s.38(2); Sask., s.30(1)

The most difficult issue raised by this provision is whether the Commission should follow its current practice of underwriting the cost of a complainant's standing as a party or whether the complainant's position should be subsumed by that of the Commission having carriage of the complaint before a board of inquiry. The senior status of the Commission's present legal counsel and the cost associated with the current practice suggest that the latter course of action may be preferable. Such a step would not, of course, preclude any party from retaining his/her own counsel.

RECOMMENDATIONS:

5.28 It is recommended that the New Brunswick Charter provide that the parties to a board of inquiry be as set out in section 20(4.1) of the present New Brunswick Human Rights Code.

5.29 It is recommended that the New Brunswick Charter establish that the Commission shall have carriage of the complaint before a board of inquiry.

5.30 It is recommended that, as a matter of practice, the Commission not pay the costs of a complainant's legal counsel, if any.

3) Procedure and Powers of a Board of Inquiry

Section 20(3) of the New Brunswick Act confers on a board of inquiry "all the powers of a Conciliation Board under the Industrial Relations Act". Section 67 of the Industrial Relations Act sets out the powers of such a board including those relating to summons, search, production, hearing and contempt.[31]

As set out in the attached Table, eight of the other nine provincial commissions have the authority equivalent to a Commissioner appointed under the New Brunswick Inquiries Act. The remaining provincial jurisdiction - Ontario - and the Federal Government have also conferred very broad inquiry powers on their respective procedures. An Ontario tribunal has authority vested under the Province's Statutory Powers Procedure Act as well as special provisions regarding the recording of evidence. A Federal Tribunal is accorded the evidentiary powers of "a superior court of record".

Table 5E - Procedure and Powers of a Board of Inquiry

Powers of a Conciliation Board appointed under Industrial Relations Act	N.B., s.20(3)
Powers of a commissioner under provincial or territorial public inquiries legislation	Alta., s.28(1); B.C., s.16(2); Man., s.37; Nfld., s.28; N.S., s.26A; Sask., s.31; Yukon; s.22.
Powers of a court of superior record	Fed., s.50

Right to counsel	B.C., s.16(4)
Right to cross-examination	B.C., s.16(4)
Right to order production of documents	Man., s.38
Powers re recording of evidence	Ont., s.39
Broad evidentiary powers	B.C., s.16(5); Ont., s.38
Statutory powers procedure legislation applicable	Alta., s.29(2); Ont., s.38.

The powers conferred and procedural safeguards protected by the Inquiries Act[32] are more appropriate to the function of a board of inquiry. In addition to the conferral of these broad inquiry powers, it is appropriate to require that the Charter, either in the statute itself or by regulation, set out the rules of procedure before a board of inquiry. In accordance with the recommendations made by the Canadian Bar Association,[33] the following safeguards should be incorporated into proceedings before a board of inquiry:

a) the statute should ensure that a board of inquiry gives the parties a reasonable and adequate notice of its proceedings;

b) the statute should ensure that a board of inquiry affords an affected person a full opportunity to be heard and that the right to a public hearing be given;

c) the statute should ensure that a participant at a hearing be allowed to engage a representative - including legal counsel - whose skills can reasonably assist her or him in participating in any proceeding;

d) the statute should ensure that a party to a proceeding be allowed to call, examine and cross-examine witnesses;

e) the statute should provide that a board of inquiry be empowered to secure information relevant to the matter in question, including the power to summon witnesses and obtain documents during any proceeding at which a decision must be made;

f) the statute should provide that a board of inquiry have the power to obtain evidence under oath or affirmation;

g) the statute should ensure the disclosure of all information relevant to the decision to be made, subject to reasonable accommodation for confidentiality particularly regarding conciliation efforts made by the Commission;

h) the statute should require that a board of inquiry give a written decision with reasons - a statement of the basis upon which the decision was made and the facts to support this basis;

i) the statute should require that a notice of decision be given in those instances where the number of affected persons, geographical or other considerations so dictate;

j) the statute should provide that a record of proceedings be kept, including: (i) any document by which the proceedings were commenced; (ii) the notice of any hearing; (iii) any intermediate orders; (iv) all filed documentary evidence; (v) the transcript or notes of the oral evidence given at a hearing; and (vi) the decision and reasons therefore;

k) the statute should provide that, except where necessary to protect Charter rights, the board of inquiry not be obliged to strictly follow rules of evidence, except those pertaining to evidentiary privilege;

l) the statute should provide that a board of inquiry may adjourn any proceedings on reasonable grounds;

m) the statute should empower the board of inquiry to make interim orders and relief, or a settlement of the complaint;

n) the statute should empower the board of inquiry to consolidate proceedings and add parties where justifiably convenient to do so.

The incorporation of such minimum fair procedural standards in the New Brunswick Charter would allay the concerns expressed by a Moncton lawyer, Mr. Gregory Murphy[34] recalled that the lack of procedural guidelines at the board of inquiry in Buggie v. City of Moncton[35] precluded the parties from knowing the case they had to meet.

Moreover, in any consideration of the powers to be conferred under the New Brunswick Charter, one must be mindful of the unresolved issue of the extent to which a board may recognize and enforce powers granted to a "tribunal" under s.24(1) of the Charter. In the recent decision by the Ontario Court of Appeal in Cuddy Chicks Ltd. v. Ontario Labour Relations Board,[36] it was held that a tribunal "should consider all statutes bearing upon its decisions - including the Constitution - even if this means the board has to test the constitutional validity of its own constituent statutes".[37] However, the court fell short of concluding that the board was a s.24 court of competent jurisdiction. It held that while the tribunal can apply the Charter under section 52, it can not do so to alter its own jurisdiction which, the Court said, was "a matter deliberately left out of its legislative scheme".[38]

The decision in Cuddy Chicks is part of a nation-wide debate over the extent to which administrative tribunals may consider Charter questions, if at all.[39] The Cuddy Chicks decision reenforces the need for the conferral of clear procedural authority on a board of inquiry under the New Brunswick Charter.

RECOMMENDATION:

5.31 It is recommended that a board of inquiry appointed under the New Brunswick Charter be accorded the powers of a Commissioner under the New Brunswick Inquiries Act.

5.32 It is recommended that the New Brunswick Charter, or a board of inquiry procedure regulation made pursuant thereto, incorporate the following minimum fair procedural provisions:

- **notice of hearing;**
- **right to be heard;**
- **right to counsel;**

- **right to adduce evidence;**
- **evidentiary powers of tribunal;**
- **evidence taken on oath or affirmation;**
- **disclosure of information;**
- **written decision with reasons;**
- **notice of decision;**
- **record of proceedings;**
- **rules of evidence;**
- **adjournment;**
- **interim relief;**
- **consolidation of proceedings.**

5.33 It is recommended that the Commission prepare a 'Hearing Checklist' similar to the one distributed by the British Columbia Council on Human Rights, to assist all parties appearing before a board of inquiry.

5.34 It is recommended that a board of inquiry appointed by the Commission be conferred with jurisdiction to interpret and apply the Canadian Charter of Rights and Freedoms.

4) Remedial Powers of a Board of Inquiry

When considering what constitutes an appropriate order by a board of inquiry, one must be cognizant of decisions of the Supreme Court of Canada which have considered this question. In Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.,[40] it was said that the Code's "main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination".[41] In Canadian National Railway Co. v. Canada (Canadian Human Rights Commission),[42] the Court approved an order for a very comprehensive affirmative action program which forced C.N. to hire one woman for every four positions filled until a particular desirable ratio was achieved in the workplace. The Chief Justice of Canada remarked that: "When confronted with such a case of systemic discrimination, it may be that the type of order issued by the Tribunal is the only means by which the purpose of the Canadian Human Rights Act can be met."[43]

The New Brunswick Human Rights Code presently provides that:

s.20(6.2) Where, at the conclusion of an inquiry, the Board finds, on a balance of probabilities, that a violation of this Act has occurred, it may order any party found to have violated the Act

> (a) to do, or refrain from doing, any act or acts so as to effect compliance with the Act,
>
> (b) to rectify any harm caused by the violation,
>
> (c) to restore any party adversely affected by the violation to the position he would have been in but for the violation,
>
> (d) to reinstate any party who has been removed from a position of employment in violation of the Act,
>
> (e) to compensate any party adversely affected by the violation for any consequent expenditure, financial loss or deprivation of benefit, in such amount as the Board considers just and appropriate, and
>
> (f) to compensate any party adversely affected by the violation for any consequent emotional suffering, including that resulting from injury to dignity, feelings or self-respect, in such amount as the Board considers just and appropriate.

Two provinces, Nova Scotia and Prince Edward Island, make one broad statutory statement about the order that may be issued by a board of inquiry:

N.S. s.26A(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor.

P.E.I. s.27(1) The Minister may issue whatever order he considers necessary to carry the recommendations of the Commission into effect.

The more common approach is that followed by New Brunswick, namely, a list composed of the following explicit elements which may comprise an order:

Table 5F - Order of a Board of Inquiry

Direct party to act or cease to act	Fed., s.53(2)(a); N.B. s.20(6.2)(a); Alta., s.31(b)(ii) B.C., s.17(2)(a); Nfld., s.29(1)(b); Ont., s.40; Sask., s.31(7)(a).
Direct restitution	Fed., s.53(2)(c); N.B., s.20(6.2)(b),(c),(e); Alta.,s.31(1)(b)(iv); B.C., s.17(2)(b)(ii); Man., s.43(2)(b); Nfld., s.29(b)(iv); Ont., s.40; Sask., s.31(7)(c).

Order to provide access or amenities for the disabled	Ont., s.40(1), (4)
Order to prevent harassment	Ont., s.40(1), (4)
Order to reinstate employee	N.B., s.20(6.2)(d)
Rectify offending harassment	Yukon, s.23(1)(b)
Pay any other party damages	Man., s.43(2)(b)
Restitution for injury to dignity or feelings	Fed., s.53(3); N.B., s.20(6.2)(f); Man., s.43(2)(c); Yukon, s.23(1)(d).
Exemplary damages	Fed., s.53(3); Man., s.43(2)(b); Sask., s.31(8); Yukon, s.23(1)(e)
Order to adopt affirmative action program	Sask., s.31(7)(a)
Order to make available the opportunity denied to complainant	Fed., s.53(2)(b); Alta., s.31(b)(iii); B.C., s.(17(2)(b)(i); Nfld., s.29(b)(iii).
Order taking whatever action board considers appropriate	Alta., s.31(1)(b)(v); Nfld., s.29(1)(b)(v).
Pay costs	(see Table 5G)

RECOMMENDATION:

5.35 **It is recommended that the New Brunswick Charter provide that a board of inquiry be empowered to order any party who has contravened the Charter to comply with the Charter and/or make rectification for the contravention. This order may include any of the following elements:**

- **to act or to cease to act;**
- **to pay restitution;**
- **to provide access or other amenities for the disabled;**
- **to pay damages of either a general, special or exemplary nature;**
- **to cease and rectify an offending harassment;**

- to make available the opportunity denied to the complainant;

- to adopt an affirmative action program;

- to pay costs;

- to take whatever other action the board considers appropriate.

5) Appeal from a Board of Inquiry Decision

Section 21 of the New Brunswick Human Rights Code provides that "all orders and decisions of the Board of Inquiry are final ...". Section 21(1) is a privitive clause designed to protect any decision of a board of inquiry from judicial review except on the basis of a lack of jurisdiction which would include failure to follow procedural requirements, failure to act within jurisdiction by exercising powers in excess of the powers given to it, failure to properly exercise a discretion (e.g. the consideration of an irrelevant matter) or failure to be fair.

The following is a list of errors of law permitting judicial intervention generally categorized as lack of jurisdiction:

a) statutory pre-conditions to the exercise of public powers must be met before the exercise of those powers;

b) a decision must be made on the basis of relevant considerations, relevancy being determined by reference to the governing legislation;

c) public powers may not be exercised for purposes other than those for which the powers are granted;

d) a public decision-maker may not bind itself or fetter its discretion by making general rules which apply to every case;

e) public powers must not be exercised in bad faith; i.e. with bias or malice or for improper motives;

f) public powers must be exercised in accordance with the principles of natural justice or fairness;

g) there must be some evidence before a decision-maker to justify decisions of fact;

h) public powers must be exercised by those entrusted with them and may not be improperly delegated to others;

i) public powers must not be exercised in violation of the Canadian Charter of Rights and Freedoms;

j) a decision may not be so unreasonable that no reasonable person in the position of the decision-maker could have made it; and

k) a decision in which a tribunal erred in its interpretation of the governing or related legislation or common law principles.[44]

An application for judicial review under Rule 69 of the Rules of Court would lie for any of these jurisdictional failures.

It is also important to note that, while a privitive clause does not preclude the judicial review of a board of inquiry's proceedings and decision, the concept of "jurisdiction" does not usually address the actual merits of the decision made by a board of inquiry; a court on judicial review will not intervene on the substance of board of inquiry decision-making that is otherwise legal.[45]

Generally speaking, such errors do not permit the courts to substitute their opinion for that of the board of inquiry. In most cases, an impugned matter would be remitted back to the board of inquiry to be re-determined "in accordance with the law".[46]

Moreover, if a board of inquiry has the authority or power to make the findings and orders set out in the Code, and if its decision is not "manifestly unreasonable", it is doubtful it can be successfully challenged by a court.[47]

As the following Table points out, other Canadian jurisdictions provide a variety of "appeal" or judicial review provisions. The distinction between the two terms is only understood in the context of the scope of judicial powers provided under a given "appeal" provision. This term is certainly not to be confused with the meaning normally attributable to it in other judicial proceedings.

Table 5G - Appeal From a Decision of a Board of Inquiry

Fed.	s.55	where the tribunal that made the order was composed of fewer than three members, the Commission, victim, or alleged discriminator may appeal ... to a Review Tribunal composed of 3 members of the Commission other than the original hearers on any question of law or fact or mixed law or fact[48]
N.B.	s.21(1)	all decisions of a Board of Inquiry are final ...
Alta	s.33	may appeal to Court of Queen's Bench; must get leave if appeal consists wholly or partly of question of fact or mixed fact & law

B.C.	none	
Man.	s.50(1)	may apply for judicial review on ground of - error of jurisdiction - breach of natural justice - error of law on face of record
Nfld.	s.31(1)	party may appeal by way of application to Trial Division
	s.31(2)	need leave if appeal consists wholly or partly of question of fact or mixed fact and law
	s.31(3) - (6)	rules
	s.31(8)	commencement of appeal does not operate as a stay of the proceedings
N.S.	s.27(1)	may appeal on a question of law in accordance with rules of court
	s.27(2)	file record of proceedings
Ont.	s.41(1)	may appeal in accordance with rules of court
	s.41(2)	with transcript
	s.41(3)	a question of law or fact
P.E.I.	none	
Que.	s.109	judicial recourse provided on question of jurisdiction
Sask.	s.32(1)	may appeal on question of law.
Yukon	s.26	may appeal to the Supreme Court (procedure the same as for other appeals on questions of law)

In view of the very highest order of rights affected by the decisions of boards of inquiry, it is concluded that a mere right of judicial review is not a sufficient basis upon which to challenge such decisions. Moreover, it is necessary to explicitly set out the type of "appeal" rights that would pertain in such a circumstance. This conclusion is buttressed by those of an Edmundston lawyer. Mr. Gary McLaughlin has stated that:

> It is my feeling that a Human Right case should be treated differently and not subject to the very strict rules governing judicial review. The present state of the law does not allow a Judge of the Court of Queen's Bench to correct errors in finding of fact unless they are manifestly wrong, and it would appear the Courts have interpreted this to mean that if there is any evidence however trivial to support the finding of a board of inquiry it is to be upheld. The test should be changed and the Judge given a jurisdiction to review the evidence and make findings of fact based on the evidence without having to adhere to the strict manifest error rule.[49]

RECOMMENDATION:

5.36 It is recommended that the New Brunswick Charter provide that a party may appeal from a decision of a board of inquiry by way of application to The Court of Queen's Bench of New Brunswick:

- **with a transcript of all proceedings;**
- **in accordance with the Rules of Court;**
- **upon a question of law or a question of fact or of mixed law and fact;**
- **within 60 days of the service of the board's decision;**
- **with or without leave.**

6) Costs

The financing of boards of inquiry has recently become a contentious issue in New Brunswick. The long-standing practice of our Commission to fully underwrite a complainant's legal costs at a board of inquiry in an instance where a board of inquiry has no authority to award costs to a successful respondent has given rise to concerns about the fairness the respondent has experienced.

As the following Table indicates, eight Canadian statutory complaint mechanisms have been conferred with varying degrees of costs authority:

Table 5H - Costs Respecting a Board of Inquiry

Fed.	none	
N.B.	none	
Alta.	s.31(2)	A board of inquiry may make any order as to costs it considers appropriate.
B.C.	s.17(3)	A board of inquiry may make an order as to costs it considers appropriate.
Man.	s.45	Subject to an order of an adjudicator, the parties to an adjudication shall pay their own costs.

Nfld.	s.29(2)	A board of inquiry may make whatever order as to costs that it considers appropriate.
N.S.	s.26A(7)	A board of inquiry has the jurisdiction and authority to determine whether the Act has been contravened and "for the making of any order pursuant to such decision".
Ont.	s.40(6)	Where, upon dismissing a complaint, the board of inquiry finds that the complaint was trivial, frivolous, vexatious or made in bad faith or has caused undue hardship to the respondent, the board may order the Commission to pay the respondents costs.
P.E.I.	s.27(1)	The Minister, after receiving the Commission's recommendations on the findings of the board of inquiry, "may issue whatever order he considers necessary" to give effect to such recommendations.
Que.	none	
Sask.	none	
Yukon	s.24	If a board of adjudication concludes that a (a) complaint was frivolous or vexatious, it may order Commission to pay respondent's costs and/or damages. (b) complaint was based on information complainant knew to be false, it may order complainant to pay respondent's costs and/or damages.

RECOMMENDATION:

5.37 It is recommended that the New Brunswick Charter confer a costs power on a board of inquiry, including the power to award costs to a complainant and, as in s.40(6) of the Ontario Human Rights Code, where, upon dismissing a complaint, the board of inquiry finds that the complaint was trivial, frivolous, vexatious or made in bad faith or has caused undue hardship to the respondent, the board may order the Commission to pay the respondent's costs.

7) Enforcement

In New Brunswick and throughout Canada generally, human rights legislation provides for the enforcement of orders through court filing, the commencement of a prosecution and the issuance of an injunction by a court.

The provisions set out in s.21(3), 21(4) and s.23 - 27 of the New Brunswick Human Rights Code are representative of those found in the majority of Canadian human rights statutes. These provisions provide that:

> s.21(3) Where a Board of Inquiry makes an order pursuant to subsection 20(6.2), the Board or any party to the inquiry may file a certified copy of the order in The Court of Queen's Bench of New Brunswick, and such order shall be entered and recorded in the Court and, when so entered and recorded, becomes a judgment of the Court and may be enforced as a judgment of the Court.
>
> s.21(4) All reasonable costs and charges attendant upon the filing, entering and recording of an order under subsection (3) may be recovered in like manner as if the amount had been included in the order.
>
> . . .
>
> s.23 Every person who fails to comply with any provision of this Act or with any order made under this Act is guilty of an offence and on summary conviction is liable
>
> > (a) if an individual, to a penalty of not more than five hundred dollars, or
> >
> > (b) if a corporation, trade union, employers' organization, employment agency, professional association or business or trade association, to a penalty of not more than two thousand dollars.
>
> s.24 No person shall institute a prosecution for an offence under this Act unless the Minister consents thereto in writing.
>
> s.25 Where an employer is convicted of a violation of section 3 or a violation of section 8 in relation to employment, the judge, in addition to any other penalty,
>
> > (a) may order the employer to pay the aggrieved person compensation for loss of employment not exceeding such sum as in the opinion of the judge is equivalent to the wages, salary or remuneration that would have accrued to that person up to the date of conviction but for such violation of section 3 or 8; and
> >
> > (b) may order the employer to reinstate the aggrieved person in his employ at such date as in the opinion of the judge is just and proper under the circumstances, in the position that that person would have held but for violation of section 3 or 8.
>
> s.26 A prosecution for an offence under this Act may be instituted against a trade union, employers' organization, employment agency, professional association, or business or trade association in the name of the union, organization, agency or association and any act or thing done or omitted to be done by an officer, official or agent of a trade union, employers' organization, employment agency, professional association, or business or trade association within the scope of his authority to act on behalf of the union, organization, agency or association shall be deemed to be an act or thing done or omitted to be done by the union, organization, agency or association. 1971, c.8, s.26.

> s.27(1) Where a person has been convicted of a violation of this Act the Minister may apply by way of notice of application to a judge of The Court of Queen's Bench of New Brunswick for an order enjoining such person from continuing such violation.
>
> s.27(2) The judge in his discretion may make such order and the order may be enforced in the same manner as any other order and judgment of The Court of Queen's Bench of New Brunswick.

Provincial offences under the Code deal with: a) the obstruction of the Commission or a board of inquiry; b) non-compliance with a lawful requirement by any person acting under the authority of the statute, or c) the making of a false statement to, or the misleading of any person acting under, the Act. It has been suggested that the New Brunswick statute should create more explicit offences provisions, including these three grounds and also "the failure to comply with the terms of any settlement of a complaint approved."[90]

A number of respondents to this inquiry expressed concern about the low level of financial penalties established under our New Brunswick Code. Under sections 56 to 58 of the new Provincial Offences Procedure Act, categories of offences are created to which certain penalties' limits are ascribed. It is suggested that the penalties under the New Brunswick Charter be commensurate with the pre-eminent nature of the Charter's objects.[91]

The attached Table identifies the types of enforcement procedures, including the penalties limits, under Canadian human rights statutes.

Table 51 - Enforcement Procedures Under Human Rights Legislation

Filing of order with Court	Fed., s.57; N.B., s.21(3), (4); Alta., s.32; Man., s.48; Nfld., s.30; Sask., s.33, s.42.
Prosecution	Fed., s.60; N.B., s.23; Alta., s.26; Man., s.51; Nfld., s.34; N.S., s.29; Ont., s.43; P.E.I., s.28; Que., s.87; Sask., s.35; Yukon, s.27, s.28, s.28.1.
Penalties limits (individual/others/ restitution order)	Fed., s.60(2) - $50,000 (employment)/$5,000 N.B., s.23, s.25 -$500/$2,000/order; Man., s.51 - $2,000/$10,000/order; Nfld., s.34 - $100/$500/order; N.S., s.29 - $500/$1,000/-; Ont., s.43 - $25,000; P.E.I., s.28 - $500/$2,000;

	Sask., s.35 - $500-$2,000/ $2,000-$3,000/-; Yukon, s.29 - $2,000.
Injunction	N.B., s.27; Alta., s.34; Man., s.55; Nfld., s.36; N.S., s.32; P.E.I., s.31; Que., s.83; Sask., s.38; Yukon, s.30.
Consent of Minister re prosecution	Fed., s.60(4); N.B., s.24; Man., s.51(3); N.S., s.30(1); Ont., s.43(2).

RECOMMENDATIONS:

5.38 It is recommended that the New Brunswick Charter retain the enforcement procedures presently found in the New Brunswick Human Rights Code.

5.39 It is recommended that references to the "Minister of Labour" in the New Brunswick Human Rights Code's enforcement provisions be replaced by references to "the Commission".

5.40 It is recommended that more specifically worded offences be established under the New Brunswick Charter.

5.41 It is recommended that the penalties attendant upon a conviction under the New Brunswick Charter be increased to reflect the pre-eminent status of rights protected under the Charter; and that the penalties set out in the New Brunswick Provincial Offences Procedure Act for a category I offence be appropriate.

C) Evidentiary Considerations

1) Burden of Proof

The proof requirements under the provincial human rights statutes have been succinctly set out by Mr. Justice McIntyre in the case of Ontario Human Rights Commission v. Simpsons-Sears:[52]

> To begin with, experience has show that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element. The burden need not in all cases be heavy - it will vary with particular cases - and it may not apply to one party on all

> issues in the case; it may shift from one to the other. But as a practical expedient it has been found necessary, in order to insure a clear result in any judicial proceeding, to have available as a 'tie-breaker' the concept of the onus of proof.[53]

His Lordship proceeded to state the following general principles with respect to the burden of proof in human rights proceedings:

> a) in direct discrimination cases, where the complainant has shown a prima facie case of discrimination on a prohibited ground, the onus falls on the respondent to justify the discriminatory rule on a balance of probabilities;
>
> b) in adverse discrimination cases, the complainant must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent;
>
> c) where adverse effect discrimination is shown and the offending rule is rationally connected to the performance of the job, the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship;
>
> d) the onus of establishing "undue hardship" rests on the respondent for it is he who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence;
>
> e) this onus will not be a heavy one in all cases. In some cases it may be established without evidence; for example, a requirement that all employees work on Saturday in a business which is open only on Saturdays, but once the prima facie proof of a discriminatory effect is made it will remain for the employer to show undue hardship if required to take more steps for its accommodation than he has done.[54]

Although such a burden of proof applies with respect to proceedings before the Commission or a board of inquiry, it is appropriate that a specific onus of proof provision be incorporated in the New Brunswick Charter in wording similar to that found in s.52 of the Manitoba Code:

> 52. In any proceeding under this Code, the onus of proving that a provision of this Code has been contravened lies on the person alleging the contravention, but the onus of proving

> (a) the existence of a bona fide and reasonable cause for discrimination; or
>
> (b) that a requirement or qualification for an employment or occupation is bona fide and reasonable; or
>
> (c) that reasonable accommodation has been made or is not possible in the circumstances; or
>
> (d) the applicability of any other exception to the prohibitions enacted by this Code; lies on the person alleging that matter.

RECOMMENDATION:

5.42 It is recommended that there be incorporated in the New Brunswick Charter an 'onus of proof' provision similar to that contained in section 52 of the Manitoba Human Rights Code with respect to proceedings before a board of inquiry or the Commission.

2) Technical Defect or Irregularity

At present, the New Brunswick Code does not protect a proceeding from being invalidated because of a defect in form or technical irregularity.

"Form" means the legal or technical manner or order to be observed in legal instruments and judicial proceedings or in the construction of legal documents or processes and is the antithesis of substance. In documents, a matter of form relates to the mode, form, or style of expressing the facts involved, the choice of arrangement of words and any other such particular without affecting the substantial validity or sufficiency of the document or without going to its merits.[55] A "technical error" may be defined as any error, defect, irregularity, or variance which is trivial, or formal, or merely academic and does not prejudice the substantive rights of any party.[56]

A "slip rule", exists in seven of the other nine Canadian provincial jurisdictions. A typical provision is that found in s.61 of the Manitoba Code:

> 61. Except as otherwise provided herein, no proceeding under this Code is invalid by reason of any defect in form or any technical irregularity.
>
> [see also - Alta., s.36(2); B.C., s.22(1);
> Man., s.61; Nfld., s.38; N.S., s.30(2);
> P.E.I., s.29(1); Sask., s.37.]

The inclusion of such a provision, which has been recommended by the Commission's Legal Counsel[57], would promote the objects of the New Brunswick Charter.

RECOMMENDATION:

5.43 It is recommended that a 'slip rule' be incorporated in the New Brunswick Charter similar to that found in section 61 of the Manitoba Human Rights Code.

3) Public Inspection and Access to Information

Section 46(2) of the Manitoba Code provides that:

> The Commission shall make available for public inspection, during normal offices hours, every decision, order and statement of reasons it receives.

Section 2 of the New Brunswick Right to Information Act[58] provides that, subject to the express limitations contained therein, every person has a right to request and receive information relating to the public business of the Province; however, it does not expressly apply to information in the hands of the New Brunswick Human Rights Commission.

Moreover, the Right to Information Act does not contain explicit privacy protection provisions - e.g. the right of a complainant or respondent to examine a complaint file at the Commission to ensure that information is accurate and to correct any inaccuracies.

The more difficult information access questions relate to the extent of confidentiality to be extended to the deliberations of the Commission and its conciliation efforts. It is generally conceded that, as in labour law, evidence relating to conciliation, including the Commission's discussion of this evidence, should be expressly protected from disclosure. However, all other information should be subject to the Right to Information Act.

RECOMMENDATIONS:

5.44 It is recommended that the New Brunswick Charter provide that evidence respecting the Commission's conciliation function be protected from disclosure.

5.45 It is recommended that an explicit right of access to information, including personal information, be incorporated in the New Brunswick Charter and/or the New Brunswick Right to Information Act.

D. Immunities, Privileges and Protections

1) General Considerations

Generally, statutory protections, privileges and immunities, which are absent from the New Brunswick Code, confer upon human rights commissions, the staff of such commissions and boards of inquiry a status designed to promote efficiency, and effectiveness by:

a) protecting statutory proceedings from judicial review;

b) protecting the Commission and staff members from civil proceedings for anything done in good faith;

c) preventing the use of any information obtained or produced under the Act in any other proceeding;

d) preventing the Commission or any staff member from testifying in court;

e) conferring a special protection from liability for anything said or done during or after a Commission investigation, and

f) providing protection from prosecution to anyone acting in compliance with a requirement of the Human Rights statute.

To facilitate these objectives, some human rights statutes contain a number of court-tested "boiler plate" provisions including privitive clauses and immunity provisions, non-competency and non-compellability clauses.

It must be noted that each of the last three privileges and protections is subject to the important proviso that the protection does not extend to federal statutes, in particular the Criminal Code of Canada. They do, however, extend to provincial quasi-criminal proceedings, as well as any civil or administrative procedure.

The following Table sets out graphically the extent to which privileges, protections and immunities have been incorporated in Canadian human rights legislation.

Table 5J - Privileges, Protections and Immunities

Privitive clause	see Table 5G
Statutory immunity	Man., s.62; Nfld., s.32(2); Que., s.86; Sask., s.34.
Court privileges	None.
Non-competency and non-compellability	Alta., s.36; B.C., s.18; Man., s.59; Nfld., s.32(1); N.S., s.26B; Ont., s.29; P.E.I., s.23(3).
Admissibility of evidence in other proceedings	None.
Protection for compliance with Commission requirement	None.

2) Privitive Clause

The advisability of, including a privitive clause in the New Brunswick Charter is discussed under the heading "Appeal from a board of inquiry decision" as set out in Part III(B)(5) above.

3) Statutory Immunity

As set out in Table 5J above, four jurisdictions - Manitoba, Newfoundland, Quebec and Saskatchewan - provide that no civil proceedings may be taken against a Commission or (except in the case of Quebec) a board of inquiry or an adjudicator for actions taken in the exercise of statutory functions. In the case of Manitoba and Saskatchewan, no such action may be taken unless it is shown that the statutory bodies acted in bad faith or negligently. In the case of Quebec and Newfoundland, such action may only be taken if the Commission or other statutory body is shown to have acted in bad faith. There is a significant difference in the two types of provisions.

At the outset, it must be borne in mind that human rights Commissions and adjudicative bodies appointed under the Code are statutory creations whose functions, powers, and duties are established by the Code. Without special protection, these statutory officials would be liable for losses by a member of the class of persons for whose benefit statutory bodies were created.

Under the Quebec and Newfoundland models, the statutory officials are only liable if they act in bad faith. Bad faith is the opposite of good faith and generally implies or involves actual or constructive fraud, or acts designed to mislead or deceive another, or a neglect or a refusal to fulfill some duty, or some contractual obligation not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. It implies or contemplates the state of mind affirmatively operating with proof of design or ill will.[59]

Obviously, it would be much easier for a statutory body to meet a "good faith" test than a "good faith and without negligence" test. Negligence is defined as "the omission to do something which a reasonable person guided by those ordinary considerations which ordinarily regulate human affairs would do or the doing of something which a reasonably prudent person would not do".[60]

It is questionable whether the Manitoba/Saskatchewan model serves any practical purpose. In this regard, it is noteworthy that all nine Canadian provincial Ombudsmen statutes contain a provision similar to that found in the Newfoundland and Quebec legislation.

It is felt useful to obtain such protection, and concluded that one similar to the following Newfoundland provision be included:

> 32. Neither the Minister, the Commission, a member of the Commission, the Executive Director, a person designated by the Executive Director to inquire into a complaint or a member of a board of inquiry constituted under this Act is liable for loss or damage suffered by a person by reason of anything done or omitted to be done in good faith pursuant to or in the exercise or supposed exercise of the powers conferred by this Act.

RECOMMENDATION:

5.46 It is recommended that the New Brunswick Charter incorporate a statutory immunity provision similar to that found in section 32 of the Newfoundland Human Rights Code.

4) Court Privilege

At common law, all parties concerned in judicial proceedings of any nature, including judges, lawyers and witnesses, enjoy absolute protection for what they say, i.e. any statements made in a judicial hearing cannot be used by any person against the maker in an action for defamation. If such a protection were incorporated into the New Brunswick Charter, it would protect not only those persons acting under statute but other parties whose comments are included in any report. The courts have held that statements made by those duly authorized to investigate suspected irregularities of public or private affairs are privileged, if made to persons connected with the inquiry and even if made to them in the presence of others not connected with an inquiry.[61] In addition, statements made to a public authority in connection with matters over which the authority has jurisdiction are qualifiedly privileged.[62] To obtain such a qualified privilege, the following criteria must be met; the report must be made in good faith, serve a public concern and be of interest to the general public. The statement in issue must not be an extraneous one and the maker must not take improper advantage of office or position in making it.

It is deemed useful to confer such a privilege on proceedings before the Commission or a board of inquiry; moreover, it is recommended that the following provision from the British Columbia Ombudsman Act be adopted.

> 28(2) For the purposes of any Act or Law respecting libel or slander,
>
> (a) anything said, all information supplied and all documents and things produced in the course of an inquiry or proceedings before the Ombudsman under this Act are privileged to the same extent as if the inquiry or proceedings were proceedings in a court; and
>
> (b) a report made by the Ombudsman and a fair and accurate account of the report in a newspaper, periodical publication or broadcast is privileged to the same extent as if the report of the Ombudsman were the order of a court.[63]

RECOMMENDATION:

5.47 It is recommended that the New Brunswick Charter provide that a "court privilege" be extended to the proceedings before the Commission similar to that found in section 28(2) of the British Columbia Ombudsman Act.

5) Non-competency and Non-compellability

Non-competency and non-compellability protect a public official and staff members from being called as witnesses under summons or subpoena in any proceeding instituted under provincial authority. It enables the public official to receive and obtain information and material in confidence and to give an assurance to the parties that such a confidence will be maintained. Although the public nature of many of the proceedings under human rights statutes may limit the necessity of such a provision, seven provincial jurisdictions have seen fit to enact such legislation (see Table 5I above).

The New Brunswick Ombudsman Act contains the most comprehensive non-competency/non-compellability legislation. Subsection 24(2) of the Act provides that:

> 24(2) The Ombudsman or any person holding any office or appointment under the Ombudsman shall not be called to give evidence in any court or in any proceedings of a judicial nature in respect of anything coming to his knowledge in the exercise of any of his functions under this Act whether or not that function was within his jurisdiction. (emphasis added)[64]

A less rigid non-compellability provision is found in section 29 of the Ontario Human Rights Code:

> 29(1). No person who is a member of the Commission shall be required to give testimony in a civil suit or any proceeding as to information obtained in the course of an investigation under this Act.
>
> 29(2). No person who is employed in the administration of this Act shall be required to give testimony in a civil suit or any proceeding other than a proceeding under this Act as to information obtained in the course of an investigation under this Act.

RECOMMENDATION:

5.48 It is recommended that the New Brunswick Charter incorporate a non-compellability provision similar to section 29 of the Ontario Human Rights Code. This provision may extend to non-jurisdictional proceedings as in the section 24(2) of the New Brunswick Ombudsman Act.

6) Admissibility of Evidence in Other Proceedings

Section 13 of the Canadian Charter of Rights and Freedoms gives a right against self-discrimination:

> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Similar provisions are contained in all Canadian provincial Ombudsman legislation, including the New Brunswick Ombudsman Act, subsection 18(8) of which says:

> s.18(8). Except on the trial of a person for perjury, evidence given by any person in proceedings before the Ombudsman and evidence of any proceeding before the Ombudsman is not admissible against any person in any court or in any proceedings of a judicial nature.[65]

Such a protection would extend not only to the maker of the statement but any other person in any other proceeding.

RECOMMENDATION:

5.49 It is recommended that the New Brunswick Charter incorporate the protection of section 13 of the Canadian Charter of Rights and Freedoms (see also Recommendation 2.6).

7) Protection for Statutory Compliance

Seven Canadian provincial Ombudsman Acts provide immunity from prosecution for an offense by reason of a person's compliance with the requirement of the Ombudsman to provide any information. An example of this provision is found in s.18(9) of the New Brunswick Act:

> 18(9). No person is liable for an offence against any Act by reason of his compliance with any requirement of the Ombudsman under this Act.[66]

In suggesting the incorporation of such a provision in the New Brunswick Charter, the growing involvement of the Human Rights Commission in discriminatory practices by public agencies is acknowledged.

RECOMMENDATION:

5.50 It is recommended that the New Brunswick Charter incorporate a statutory protection for those persons who comply with the provisions of the Charter.

E) Regulations

No regulations have yet been promulgated under section 16 of the New Brunswick Code, nor in seven of the other 11 Canadian jurisdictions whose statute contain a regulation-making authority.

The following Table outlines the regulation-making authority under Canadian legislation:

Table 5K - Regulation-making Authority

Governor-in-Council on recommendation of CHRC	Fed., s.29
Lieutenant-Governor in Council	N.B., s.16; Alta., s.13; B.C., s.24; Man., s.63(1); Nfld., s.39; N.S., s.33(2); Ont., s.47.
Lieutenant-Governor in Council (Commissioner in Executive Council) in consultation with Commission	Yukon, s.33; Que., s.86.8-86.10.
Lieutenant-Governor in Council or Commission with approval of Lieutenant-Governor in Council	Sask., s.46.
Commission with approval of Lieutenant-Governor in Council	P.E.I., s.32(2)
Commission - internal by-law	Que., s.64
Commission - complaint form	Man., s.63(2)

It is noteworthy that the Commissions in three of the four jurisdictions which have made extensive regulations - Canada (federal), Saskatchewan, and Yukon - have the statutory authority to contribute to this process.

An examination of the four jurisdictions that have made regulations confirms that such authority provides a means to concretely address the following:

a) complaint procedure, including initiation, withdrawal, investigation, settlement or other disposition;

b) boards of inquiry, including initiation, rules of procedure and disposition;

c) exemptions;

d) special programs; and

e) physical assistance to the disabled.

f) related definitions; and

g) forms.[67]

As reflected in the recommendations made elsewhere in this Report[68], a regulation-making authority would be of assistance in the administration of the New Brunswick Charter.

In addressing this recommendation, the Legislature must decide the extent, if any, to which it is prepared to delegate its substantive law-making powers to the Lieutenant-Governor in Council and the New Brunswick Human Rights Commission.

RECOMMENDATIONS:

5.51 It is recommended that the New Brunswick Charter provide that the Lieutenant-Governor in Council, on the recommendation of the Commission, be empowered to make regulations.

5.52 It is recommended that this regulation-making power set out the types of regulations that may be made under the Charter, including those relating to:

- **complaint initiation and disposition;**
- **boards of inquiry procedure;**
- **exemptions;**
- **special (affirmative action) programs;**
- **physical assistance to the disabled;**
- **definition and form-making authority; and**
- **a general regulation-making authority.**

(see also Recommendations 3.17, 3.21, 4.12, 4.23, 4.36, 4.50, 5.26 and 5.32.)

END NOTES

1. Lecture by and interview with Mr. John Hucker, Secretary General, C.H.R.C., Charlottetown, July 18, 1989.

2. Interviews with Dr. Anthony Johnston, late Ex. Dir., N.S.H.R.C., April 27, 1989; John Lynch, former Ex. Dir., A.H.R.C., May 24, 1989; M. Hailou Wolde-Giorghis, Research Dir., Q.H.R.C., June 6, 1989; Ms. Joanne St-Louis, Ex. Asst., Ont.H.R.C., July 4 & 5, 1989; Mr. Ken Filkow, Chair, Man.H.R.C., Winnipeg, July 6, 1989; James Wyatt, Ex. Dir., P.E.I.H.R.C., July 18, 1989; Mr. Kenneth Jarvent, Ex. Dir., Sask.H.R.C., July 20, 1989; Ms. Janet Cullinan and Ms. Karen Taylor, Directors of Compliance, Education and Development, August 4 and 18, 1989; Mr. Alan Andison, Mgr., B.C.C.H.R., August 22, 1989; Ms. Gladys Vivian, Ex. Dir., Nfld.H.R.C., September, 1989; Ms. Margaret McCullough, Y.H.R.C. Also, telephone interviews with Mr. E.D. Smith and Mr. Gerald McLaren, former and present officials responsible for N.W.T. Fair Procedures Act on August 2, 1989 and Mr. David Porter, Ex. Dir., Y.H.R.C., October 3, 1989.

3. This question was discussed in the interviews with Mr. John Lynch and Mr. Alan Andison (see endnote 2 above).

4. The concerns about New Brunswick's compliance procedure are expressed most clearly in responses received from Ms. Janet Cullinan, Mr. Simon Puxley, Mr. Charles Shannon, and Mr. Clyde Spinney. These responses are set out in Appendix D-10; D-32, D-33 and D-34. They were also enunciated in a meeting held with officials of School District 15 - including Board Chairman, Mr. Carl Ross; Legal Counsel, Mr. James Letcher; and Superintendent, Mr. Ross MacCallum in Moncton on July 26, 1989.

5. Ibid.

6. Interviews with Ms. Janet Cullinan, Director of Compliance, N.B.H.R.C., Fredericton, August 4, 1989; and with Ms. Karen Taylor, Director of Education and Development, N.B.H.R.C., Federation, August 18, 1989.

7. Ibid.

8. The Reports in Appendix E are in a separate binder.

9. The Responses in Appendix D are in a separate binder.

10. See for example, The Canadian Abridgment, (2d), 4th Permanent Supplement, v. 1 (Toronto: Carswell, 1984) p. 23-37.

11. Singh et. al. v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177.

12. Ibid. at 229.

13. Appendix H, p. 57.

14. Ibid. at 59.

15. Peter Hogg, Canada Act 1982 Annotated, (Toronto: Carswell, 1982) p. 65.

16. Borowski v. A.-G. for Canada, [1989] 1 S.C.R. 342 at 366.

17. Ibid.

18. R.S.N.B. 1973, c.R-10.3, s.7(1). A petitioner may petition either the Ombudsman or a judge for the release of information.

19. Appendix D-25.

20. Appendix D-27.

21. Appendix D-22.

22. Appendix D-7.

23. Appendix D-31.

24. Appendix D-15.

25. New Brunswick, "Annual Report of the Human Rights Commission", in Department of Labour 1987-88 Annual Report (Fredericton: Queen's Printer, 1988) p. 53 and 55.

26. [1984] 2 S.C.R. 407.

27. [1985] 1 S.C.R. 177 at 230.

28. Appendix B-20.

29. Ibid.

30. Interview with Mr. Alan Andison, B.C.C.H.R., Vancouver, August 22, 1989.

31. Appendix C-16.

32. R.S.N.B. 1973, c. I-11, including Regulation 83-167.

33. Charles Ferris and Leary Moore - "Needed: A New Brunswick Statutory Powers Procedure Act", in Solicitor's Journal, Vol. 4, Issue 3, (Fredericton: Canadian Bar Association, Summer, 1988), p. 10-11.

34. Appendix D-21.

35. (1984), 5 C.H.R.R. D/2307.

36. Lawyer's Weekly, September 29, 1989, p. 1.

37. Ibid.

38. Ibid.

39. Ibid.

40. [1985] 2 S.C.R. 536.

41. Ibid at 547.

42. [1987] 1 S.C.R. 1114.

43. Ibid at 1141.

44. "Public Law", Law Society of Upper Canada Bar Admission Course Materials, (1988-1989) at page 23; (1979) 95 D.L.R. (3d) 473).

45. Ibid. at 22.

46. Ibid. at 23.

47. Ibid., footnote 99.

48. The Federation of New Brunswick Faculty Associations has recommended the incorporation of such a statutory provision. (Appendix D-11)

49. Appendix D-16.

50. Federation of New Brunswick Faculty Associations, Appendix D-11.

51. The Atlantic Human Rights Centre (Appendix D-3) and the New Brunswick Advisory Council on the Status of Women (Appendix D-22) have recommended an increase in the penalties limits.

52. [1985] 2 S.C.R. 536.

53. Ibid. at 558.

54. Ibid. at 558-9.

55. Black's Law Dictionary 5 ed. (St. Paul, U.S.A.: West Publishing Co., 1979) 586.

56. Ibid. at 646 and 1312.

57. Appendix D-15.

58. R.S.N.B. 1973, c.R-10.3, s.2.

59. Black's Law Dictionary 5 ed. (St. Paul, U.S.A.: West Publishing Co., 1979) 127.

60. Ibid., at 930.

61. Dewe v. Waterbury [1882] 6 S.C.R. 143; Woods v. Plumber (1908) 15 O.L.R. 552 (Ont. C.A.)

62. 8 C.E.D. (Ont.) 3d (45-111).

63. R.S.B.C. 1979, c.306.

64. R.S.N.B. 1973, c.O-11.

65. Ibid.

66. Ibid.

67. Content of the Regulations of Human Rights Act

Federal

Canadian Human Rights Benefits Regulation (and amendments) (SOR/80-68)

s.1	citation
s.2	definition
s.3	participation in benefit plans
s.4-6	benefit provisions
s.7-10	contributions

Human Rights Tribunal Appeal (SOR/80-394)

s.1	citation
s.7	definitions
s.3-5	notice of appeal
	forms schedule

Immigration Investigation Regulation (SOR 80/686)

s.1	citation
s.2	definitions
s.3-5	procedure

Customs and Excise Human Rights
Investigation Regulation (SOR/83-196)

s.1	citation
s.2	definition
s.3-9	procedure

Alberta

s.1	filing of complaint
s.2	withdrawal of complaint
s.3	treatment of complaint
s.4	investigation of complaint
s.5	disposition of complaint
s.6	settlement
s.7	order for inquiry
s.8	notice of said order
s.9	further investigation
s.10	service
s.11	coming into force

Saskatchewan

s.1	definitions
s.2-6	complaints (filing, amendment, withdrawal)
s.7-8	initial disposition of complaint
s.9	investigation (establishment of and powers of)
s.10-11	report of investigation
s.12	class actions
s.13	settlement
s.14-16	formal inquiry and notice of formal inquiry
s.17	answer to complaint by respondent
s.19-24	conduct and evidence rules of hearing
s.25	special orders
s.26	counsel
s.27	subpoenas
s.28-30	orders
s.31-39	rules governing granting of exemptions
s.40-42	rules governing approval of affirmative action programs
s.43	qualifications for guide dogs
s.44-45	interpretation
s.46	discretion of Commission as to time limits
s.47-48	non-compliance results
s.49	coming into force

Yukon

s.1	name
s.2	definitions
s.3	recording of complaint
s.4	investigation of complaints
s.5	disposition of complaint by Director
s.6	settlement of complaints
s.7	requests for Board of Adjudication
s.8	establishment of Board
s.9	adjournment
s.10	order to follow in presenting case
s.11	admissible evidence
s.12	hearings to be held in public
s.13	recording of evidence
s.14	decision
s.15	costs
s.16	intervenors
s.17	extension of time limits
s.18	notice
s.19	authentication of documents
s.20	result of non-compliance
s.21	counsel for board of adjudication
s.22	remuneration of adjudicators
s.23	absence of Chief Adjudicator

68. See particularly Chapters 3 and 4 above.

APPENDICES

APPENDIX A

A-1 United Nations Charter
A-2 United Nations International Bill of Rights
A-3 The American Bill of Rights
A-4 The Constitution Act, 1982
A-5 The Canadian Bill of Rights

APPENDIX B

Canadian Statutory Human Rights Agencies - Legislation

B-1 Canadian Human Rights Act
B-2 C.H.R.A., Human Rights Tribunal Appeal Regulations
B-3 C.H.R.A., Immigration Investigation Regulation
B-4 C.H.R.A., Customs and Excise H.R. Investigation Regulation
B-5 C.H.R.A., Canadian Human Rights Benefit Regulation
B-6 N.B. Human Rights Act
B-7 Alberta Bill of Rights
B-8 Individual's Rights Protection Act
B-9 I.R.P.A., Commission Procedure Regulation
B-10 B.C. Human Rights Act
B-11 B.C. Human Rights Act, am., 1989
B-12 B.C. Civil Rights Protection Act
B-13 Manitoba Human Rights Code
B-14 Newfoundland Human Rights Code, 1988
B-15 Nova Scotia Human Rights Act
B-16 Ontario Human Rights Code
B-17 P.E.I. Human Rights Act
B-18 P.E.I. Human Rights Act, am., 1989
B-19 Quebec Charter of Human Rights and Freedoms
B-20 Quebec Charter of Human Rights and Freedoms, am., 1989
B-21 Sask. Human Rights Code
B-22 Sask. Human Rights Code, am., 1989
B-23 S.H.R.C., Regulation 216/79
B-24 N.W.T. Fair Practices Act
B-25 Yukon Human Rights Act
B-26 Y.H.R.A., Regulation OC 1988/170

APPENDIX C

N.B. Human Rights Code - Legislative Background

C-1 Fair Employment Practices Act
C-2 Fair Accommodation Practices Act
C-3 Female Employees Fair Remuneration Act
C-4 Human Rights Act, S.N.B. 1967
C-5 Human Rights Act, S.N.B. 1971
C-6 Human Rights Act, R.S.N.B. 1973

C-7 An Act to Amend the Human Rights Act, 1974
C-8 An Act to Amend the Human Rights Act, 1976
C-9 Supreme and County Court Merger Act, 1979
C-10 An Act to Amend the Executive Council Act, 1983
C-11 An Act to Amend the Human Rights Act, 1985
C-12 Entry Warrants Act
C-13 Canadian Charter of Rights and Freedoms Compliance Act, 1986
C-14 Statute Law Amendment Act, 1986
C-15 An Act to Amend the Human Rights Act, 1987
C-16 Industrial Relations Act

APPENDIX D

Submissions by Individuals and Groups

D-1 AIDS New Brunswick
D-2 Atlantic Association of Chiefs of Police
D-3 Atlantic Human Rights Centre
D-4 Atlantic Jewish Council
D-5 Bourque, Maurice (Mr.) - June 29, 1989
D-6 Canadian Deaf-Blind and Rubella Association
D-7 Canadian National Institute for the Blind (The)
D-8 Council on Homosexuality and Religion
D-9 Crowther, Tom (Mr.)
D-10 Cullinan, Janet (Ms.)
D-11 Federation of N.B. Faculty Associations
D-12 Gays and Lesbians of Moncton, Inc.
D-13 Hay, Eldon (Prof.)
D-14 Hodges, Frederick D. (Mr.) - July 10, 1989
D-15 MacLeod, Joanne (Ms.)
D-16 McLaughlin, Gary (Mr.)
D-17 Mockler, Martin (Mr.)
D-18 Moncton Human Rights Association
D-19 Multicultural Association of Fredericton, Inc.
D-20 Multicultural Association, Greater Moncton Area
D-21 Murphy, Gregory (Mr.)
D-22 New Brunswick Advisory Council on the Status of Women
D-23 New Brunswick Association of Occupational Therapists
D-24 New Brunswick Coalition for Human Rights Reform
D-25 New Brunswick Federation of Labour
D-26 New Brunswick Multicultural Council
D-27 New Brunswick Women's Institute
D-28 Northern Lambda Nord
D-29 Paul, Reg (Mr.)
D-30 Petrie, J. Gordon (Mr.)
D-31 Premier's Council on the Status of Disabled Persons
D-32 Puxley, Simon (Mr.)
D-33 Shannon, Charles (Mr.)
D-34 Spinney, Clyde (Mr.)
D-35 Taylor, Karen (Ms.)
D-36 Union of New Brunswick Indians
D-37 Young, Francis (Mr.)

D-38 Youth Council of New Brunswick

APPENDIX E

Reports on Canadian Statutory Human Rights Agencies

E-1 New Brunswick
E-2 Alberta
E-3 British Columbia
E-4 Manitoba
E-5 Newfoundland
E-6 Nova Scotia
E-7 Ontario
E-8 Prince Edward Island
E-9 Quebec
E-10 Saskatchewan
E-11 Yukon

APPENDIX F

Language Rights and Multiculturalism as Human Rights
(Mr. Christian Whalen)

APPENDIX G

Summary of Survey Results (on Racial Prejudice)
(Dr. Joseph Fletcher)

APPENDIX H

Department of Labour Evaluation

SUMMARY OF PROCEEDINGS

February 28	Mr. Basil Stapleton, Q.C. Director, Law Reform Division Department of Justice (meeting - Fredericton)
April 20	Ms. Wendy MacLeod McKnight U.N.B. Dept of Sociology (meeting - Fredericton)
April 27	Dr. Tony Johnston Executive Director N.S.H.R.C., Halifax (meeting - Halifax)
April 27	Ms. Francine Godin-Comeau Chief H.R. Officer, N.S.H.R.C. (meeting - Halifax)
May 3	Mr. J. C. and Mr. R. M. (meeting - Newcastle)
May 5	Mr. Hajo Versteeg Chair, Pest Management Advisory Board (can.) (telephone conference)
May 9	Prof. Constantine Passaris Chair, N.B.H.R.C. (meeting - Fredericton)
May 9-11	Law Reform Commission of Canada Administrative Law Advisory Group (meeting - Stratford)
May 11	The Hon. Mr. Justice Mark MacGuigan Federal Court of Appeal (meeting - Stratford)
May 17	Prof. John McEvoy Faculty of Law, U.N.B. (meeting - Fredericton)
May 24	Mr. John Lynch Executive Director, A.H.R.C. (meeting - Edmonton)
May 29	Mr. Paul LeBreton Deputy Attorney General (written submission per Minister of Labour)

May 30	New Brunswick Multicultural Council Ms. Nina Bober, Liaison Officer (written submission)
May 30	SID-AIDS New Brunswick Ms. Elaine Sussey, Executive Director (written submission)
June 2	Federation of N.B. Faculty Associations Dr. Richard McGaw, President Mr. Robert Breen, Legal Counsel (written submission)
June 2	Mr. Gregory Murphy Murphy, Murphy & Mollins, Moncton (written submission)
June 3	Council on Homosexuality and Religion, Winnipeg Dr. A. E. Milward (written submission)
June 5	Mr. Jacques Vincent Board of Management (meeting - Fredericton)
June 6	Mr. Hailow Wolde-Giorghis Director of Research Q.H.R.C., Montreal (meeting - Montreal)
June 7	Mr. J. Gordon Petrie, Q.C. Petrie & Richmond, Fredericton (written submission)
June 10	Mr. Fred Hodges Former Commissioner N.B.H.R.C. (written submission)
June 12	Mr. Clyde Spinney Solicitor, Office of the Attorney General (written submission)
June 12	Northern Lambda Nord Mr. Richard Harrison, Director Caribou, Maine (written submission)
June 12	Atlantic Human Rights Centre Dr. Abdul Lodhi, Director Saint Thomas University (written submission)

June 12	Union of New Brunswick Indians Mr. R. Perley, President (written submission)
June 13	Mr. Charles Shannon Solicitor, City of Fredericton (written submission)
June 14	Premier's Council on the Status of Disabled Persons Mr. Randy Dickison, Executive Director (written submission)
June 14	Atlantic Association of Chiefs of Police Chief Blair Jackson, President (written submission)
June 15	Mr. Tom Crowther Publisher Fredericton Daily Gleaner (written submission)
June 16	Ms. Francine Godin-Comeau Chief H.R. Officer N.S.H.R.C., Halifax (meeting)
June 19	New Brunswick Federation of Labour Mr. Tim McCarthy, President (written submission)
June 19	Mr. Hugh McKervill Executive Director, Atlantic Division C.H.R.C., Halifax (meeting - Halifax)
June 21	Mr. Simon Puxley Mouth of Keswick (written submission)
June 21	Ms. Maureen Shebib Spokesperson, Lesbian and Gay Rights Association of N.S., Halifax (meeting - Halifax)
June 22	Altlantic Human Rights Centre Dr. Abdul Lodhi, Director 'Human Rights Priorities in Atlantic Canada' Saint Thomas University, Fredericton (meeting - Fredericton)

June 23	Gays and Lesbians of Moncton, Inc. (GLM) Mr. Winston Le Fort (written submission)
June 27	Prof. Howard McConnell University of Saskatchewan, Saskatoon (meeting - Saskatoon)
June 28	First National Native Human Rights Conference Tobique (meeting - Tobique)
June 29	Mr. Maurice Bourque Charest, Bourque, Cyr Edmundston (written submission)
June 30	N.B. Youth Council Ms. Monique LeBlanc, Executive Director (written submission)
July 4	Ms. Joanne St-Louis Executive Assistant, Ont. H.R.C. (meeting - Toronto)
July 4	Mr. Neil Finklestein Legal Counsel, Canadian Jewish Congress meeting Toronto (written submission - July 17)
July 5	Ms. Joanne St-Louis (meeting - Toronto)
July 5	Ms. Kate Erickson L.E.A.F. (meeting - Toronto)
July 6	N.B. Women's Institute Ms. Dawn Bremner, President (written submission)
July 6	Mr. Ken Filcow Chair, Man. H.R.C. (meeting - Winnipeg)
July 6	Ms. Mary Ann Burka A/Executive Director, Man.H.R.C. (meeting - Winnipeg)
July 6	Mr. David Beaton Regional Super., N.S.H.R.C. (meeting - Sydney)

July 7	Canadian National Institute for the Blind Ms. Penny Hartin, Executive Director (written submission)
July 7	Mr. Roland Penner Dean, University of Manitoba Law School (meeting - Winnipeg)
July 7	Mr. Robert Macauley, Q.C. Macauley, Chusid, Lipson & Friedman, Toronto (meeting - Toronto)
July 9	Multicultural Association, Greater Moncton Area Ms. Millie LeBlanc, Mr. Everett Ferguson (written submission)
July 10	N.B. Coalition on Human Rights Reform (meeting - Fredericton) (written submissions received on June 12 and July 22, 1989)
July 10-21	Canadian Human Rights Foundation (Summer Program, Charlottetown) - *Prof. Gordon A. Christenson - The American Bill of Rights; - Prof. Michel Lebel - La Charte Canadienne des Droits et Libertés; - Prof. Gerald Gall - Canadian Charter of Rights and Freedoms; - *Prof. Stephen Toope - Canadian and Provincial Human Rights Commissions; - *Me Nicole Trudeau-Bédard - Les Commissions Canadiennes et Provinciales des droits humains; - Prof. Martin Freeman - Les Droits des Autochtones/Rights of Aboriginal People; - Prof. Juanita Westmoreland - L'Egalité et les Droits Humains/Equality and Human Rights; - Prof. Vitit Muntarhborn - Les droits humains et le tiers-monde/Human Rights and the Third World; - Prof. Dan Livermore - Foreign Policy and Human Rights; - Prof. Wilson Head - Human Rights and the Justice System; - Mr. Howard Wilson - Human Rights and Development Aid; - Prof. Julius Grey - L'immigration, les Réfugiers et les Droits Humains/Immigration, Refugee Law and Human Rights; - Prof. John Humphrey - Human Rights World Law; - Prof. Jean-Jacques Surbeck - International Humanitarian Law; - Prof. Pierre Foucher - Philosophie et Structures des Droits Humains; - Dr. Suzanne Birks - Philosophy and Frameworks of Human Rights; - *Prof. Bert Ramcharan - Trends and Human Rights Implementation.

*Separate discussion held with these course leaders in P.E.I.

July 17	Kingsclear Indian Band Mr. Reg. Paul, Manager (written submission)
July 18	Mr. James Wyatt Executive Director, P.E.I.H.R.C. (meeting - Charlottetown)
July 19	Mr. Winston Ruck Executive Director, Black United Fund (meeting - Halifax)
July 20	Mr. Ken Jamont Executive Director, Sask.H.R.C. (meeting - Saskatoon)
July 21	Multicultural Association of Fredericton, Inc. Prof. Russell McNailly, President (written submission)
July 24	Mr. Francis Young Human Rights Officer, N.B.H.R.C. (written submission)
July 24	Canadian Deaf-Blind and Rubella Association Ms. Patricia Curtis, Executive Director (written submission)
July 26	N.B. Advisory Council on the Status of Women Ms. Jeanne D'Arc Gaudet, Chair (meeting - Moncton)
July 26	School District 15 Mr. Carl Ross, Chair Mr. James Letcher, Legal Counsel Mr. Ross MacCallum, Superintendent (meeting - Moncton)
August 2	Mr. Gerald McLaren, Mr. E.D. Smith Former and present officials responsible for administration of N.W.T. Fair Practices Act (telephone conferences)
August 4	Ms. Janet Cullinan Director of Compliance, N.B.H.R.C. (meeting - Fredericton) (written submission same date)
August 9	Ms. Joanne MacLeod Legal Counsel, N.B.H.R.C. (meeting - Fredericton) (written submission)

August 9	The Hon. Mike McKee Minister of Labour and Minister Responsible for Multiculturalism (meeting - Fredericton)
August 10	Mr. Ed Rawlinson Instructor, N.B.C.C. Chatham (meeting - Fredericton)
August 15	N.B. Association of Occupational Therapists Ms. Kate Coffman, Executive Director (written submission)
August 15	Ms. Shawn McCormick Director of Rehab., Maritime Life (meeting - Halifax)
August 18	Ms. Karen Taylor Director of Education and Development, N.B.H.R.C. (meeting - Fredericton) (written submission also)
August 22	Mr. Alan Andison Acting Director, Management Services and Compliance, B.C.C.H.R. (meeting - Vancouver)
August 23	Consultation - CBA Law Reform Commission of Canada - Administrative Law (meeting - Vancouver)
August 29	Mr. Doug Bridgeman Co-ordinator Equal Employment Opportunity Program Board of Management (meeting - Fredericton)
August 29	Ms. Ellen Barry Director, Pay Equity Bureau Board of Management (meeting - Fredericton)
August	Atlantic Human Rights Centre Dr. Abdul Lodhi, Director (meeting - Charlottetown)
September 1	Prof. Eldon Hay Mount Allison University, Sackville (written submission)

September 13	Mr. Martin Mockler Human Rights Officer, N.B.H.R.C. (meeting - Fredericton) (written submission also)
September 21	Ms. Gladys Vivian Executive Director, Nfld.H.R.C. (meeting - Charlottetown)
September 21	C.A.S.H.R.A. - Training Committee (lunch - Charlottetown)
September 21	Mrs. Helen Germsheid Executive Director, Man.H.R.C. (meeting - Charlottetown) (telephone conference)
September 21	Ms. Margaret McCullough Human Rights Officer Yukon H.R.C. (meeting - Charlottetown)
September 23	'Conference on Human Rights and Aging' U.N.B., Fredericton
September 25	Mr. Paul Muldoon Canadian Institution for Environmental Law and Policy, Toronto (conference)
September 26	Mr. Michael Logan Ms. Carole Ann Cormier Mr. Carl White Mr. Francis Young Mr. Martin Mockler Mr. Arnold Crawford Human Rights Officers, N.B.H.R.C. (meeting - Fredericton)
September 29	Mr. David Porter Executive Director, Yukon H.R.C. (telephone conference)
September 29	Mr. Milton Woodward Legal Counsel, Sask.H.R.C. (telephone conference)
October 1	Mr. Donald Purich Director Native Law Centre, University of Sask. (meeting - Ottawa)

October 3	Mr. David Porter Executive Director, Yukon H.R.C. (telephone conference)
October 4	Moncton Human Rights Association Charles Merhebi, President (written submission) (telephone conference also)
October 5	Mr. Dan Russell Lecturer Native Law Centre, University of Sask. (telephone conference)
October 6	Prof. Constantine Passaris Chair, N.B.H.R.C. (meeting - Fredericton)
October 10	Mr. Gary McLaughlin Angers, McLaughlin & Cyr Edmundston (written submission) (telephone conference also)